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CASE AND COMMENT

REPRINT OF THE JOURNAL

Subscribers to the *Journal* will have heard with pleasure that our Publishers have agreed to reprint the first eleven volumes of the *Journal*, which cover the years 1921 to 1953 (both included) and constitute the Old Series of the *Journal*.

During that period, only one issue per annum was published; but the pagination was continuous for three issues, so that each reprinted volume includes the issues for three years. [In 1954 and subsequent years there were two issues per annum; and the two issues together make up a yearly volume in the New Series, which has not been reprinted.]

The publishers have agreed to sell the complete reprinted set of eleven volumes for sixty guineas (or fifty guineas for orders placed before the advertised date) and also, so far as they can, to sell individual volumes at seven guineas each (or six guineas each if more than one ordered); but they do not guarantee to supply individual volumes. The publishers are not able to supply separately the single issue of any one only of the reprinted years.

The Editorial Committee has a considerable stock of the original issues. It has long been unable, and continues unable, to make up from them a complete set; but it is able and willing to supply single original issues of those particular years of which it has stock.

C. J. H.

ADMINISTRATION OF JUSTICE ACT, 1960—APPEALS FROM COURT OF
CRIMINAL APPEAL—APPEALS FROM DIVISIONAL COURT—HABEAS
CORPUS, PREROGATIVE ORDERS AND CONTEMPT OF COURT—"INNO-
CENT" CONTEMPT

THE Administration of Justice Act, 1960, takes its place in a long

line of measures with a similar title. Its contents are of considerable importance because not only does it effect a change in the procedure of applications for habeas corpus by affording a right of appeal to either party in a criminal case, but it also enables review by the House of Lords in that wide range of cases relating to the liberty of the subject which have hitherto only been decided by a Divisional Court. The Act falls into two parts, but though arranged in two parts it really deals with three distinct topics. The first relates to appeals to the House of Lords in criminal cases, the second deals with the law and procedure relating to contempt of court, and is accordingly of particular interest to the Press, and the third part makes substantial changes in the procedure relating to habeas corpus.

For the future an appeal may lie to the House of Lords in criminal cases at the instance either of the defendant or the prosecutor from (a) any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter and (b) from any decision of the Court of Criminal Appeal. In both cases the appeal will only lie with leave either of the court below or of the House of Lords itself, and leave may not be granted unless the court below has certified that a point of law of general public importance is involved, and it appears to that court or to the House of Lords that the point is one which ought to be considered by that House.

There are several matters to notice here. With regard to the substitution of this procedure for the certificate of the Attorney-General which has hitherto been the prerequisite of either side taking a case from the Court of Criminal Appeal to the House of Lords, there was something invidious about placing responsibility upon the chief Law Officer of the Crown for certifying that a point of law of exceptional public importance justified the accused or the Crown itself taking a case beyond the Court of Criminal Appeal, and in fact only twenty-three such appeals were certified since the Court of Appeal was established in 1908. But although the requirement of a point of law of exceptional public importance is no longer necessary, the point must be certified by the Court of Criminal Appeal itself as being of general public importance. Even if this fence has been successfully negotiated by a defendant he must still satisfy the court or the House of Lords, as the case may be, that the point is one which ought to be considered by that House. Presumably it will not be difficult to persuade the relevant tribunal on the latter point, but the question was very properly raised in both Houses of Parliament during the passage of the Bill that to require an appellant in a criminal case to satisfy a lower court of the general public importance of the law involved in his appeal

before he can obtain a decision of the higher court is, to say the least of it, anomalous when no such requirement prevents an appeal in a civil case to the House of Lords. The justification for imposing this restriction on criminal appeals to the highest court is said to lie in the very large number of almost hopeless applications which have been under the former procedure laid before the Attorney-General for his consideration. The official view is that, since the public interest requires the administration of justice to be swift as well as sure, it would be intolerable to allow the House of Lords or its Appeals Committee to be swamped with worthless applications for leave to appeal.

It has been a frequent criticism that there was no way of reviewing a decision of a Divisional Court of the Queen's Bench Division in a criminal, as distinct from a civil, cause or matter in a higher court. Here again, provided the point of law involved is of general public importance in the view of the Divisional Court, it will now be possible for both defendant and prosecutor to take the case to the House of Lords. In this way we may expect in due course clarification of the law relating to such matters as public meetings and indeed a host of other topics bearing on the liberty of the subject where the law at present depends on decisions of Divisional Courts (s. 1).

The two important changes made in relation to the law of contempt of court do not go as far as the proposals put forward by "Justice," the British Section of the International Commission of Jurists, in their report published in April 1959. This report would have confined proceedings to those instituted by the Attorney-General. The first of the changes protects the innocent disseminator; a person will in future be protected in cases of innocent publication and distribution. Section 11 provides that:

- (1) A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent, as the case may be.

Similar protection for the distributor is given by subsection (2). The burden of proof to establish the defence rests upon the person who is charged with contempt. It will be noticed that this defence is only available in that type of contempt of court where prejudice to a fair trial is involved. Accordingly no protection is given to the innocent disseminator of scandalous criticism of members of the judiciary. The second change is that it will no longer be contempt

of court of itself to publish information relating to proceedings before any court sitting in private. To this there are important exceptions covering proceedings relating to wardship, adoption and guardianship, cases before a Mental Health Review Tribunal or a county court under the Mental Health Act, 1959, and also where a court sits in private for reasons of national security, and where information relating to a secret process, discovery or manufacture is in issue in the proceedings (ss. 11 and 12).

For the first time provision is made for an appeal from an adjudication of contempt of court (s. 13). This concession should satisfy, to some extent, those who would prefer first instance proceedings for contempt to be tried like any other offence by judge and jury. The right of appeal is general in character, that is to say it includes both civil and criminal contempt, and generally speaking lies from an order for committal or attachment by an inferior court to a Divisional Court of the High Court. But in the case of a county court where appeals normally lie to the Court of Appeal, the order or decision in a contempt matter will also be subject to review in that court. Appeals from orders or decisions of a Divisional Court or the Court of Appeal as well as of the Court of Criminal Appeal and the Courts Martial Appeal Court will lie to the House of Lords, but if the appeal is a second one the restrictions already discussed in relation to criminal appeals under section 1 of the Act will apply.

On a criminal application for habeas corpus an order for the release of the prisoner can in future be refused only by a Divisional Court of the Queen's Bench Division, whether the application is made, as is normal, in the first instance, to that court or to a single judge. A single judge will continue, *e.g.*, in vacation, to be capable of granting the writ; but only the Divisional Court may refuse it whether the application is made in the first instance to that court or to a single judge; in the latter case it must be presumed that the judge will himself inform the applicant of his right to apply to the Divisional Court (s. 14 (1)). Following on the recent litigation in the name of Hastings (see [1959] C.L.J. 3, 141) the right to apply in term time from one judge to another or from one Divisional Court to another differently constituted, disappears, unless fresh evidence can be adduced in support of a second application (s. 14 (2)).

As a corollary to this clarification of the law the procedure on appeal in habeas corpus cases has been rationalised. It has always been possible in a civil case for an applicant to appeal from the Divisional Court to the Court of Appeal, and thence to the House of Lords, subject only to the ordinary rules as to leave. But in a

criminal case the decision of the Divisional Court has been final, since the Court of Appeal has no criminal jurisdiction and the application is not reviewable by the Court of Criminal Appeal which can only hear appeals against conviction or sentence. In future the provisions of section 15 will apply both to civil and to criminal cases, and the right of appeal will be available both to the applicant for the writ of habeas corpus and to the respondent. The appeal will be governed by the provisions of section 1, which gives a right of appeal in a criminal cause or matter from a Divisional Court to the House of Lords, but the restriction of section 1 (2) will not apply, and therefore it will be unnecessary to establish that a point of law of general public importance is involved, and that the point is one which ought to be considered by the House of Lords. Thus, not only is there created for the first time the right of appeal in an application for habeas corpus in a criminal case, but the right is unrestricted, subject only to the House of Lords giving leave for the appeal to be brought. On the other hand, it is somewhat puzzling to find that for the first time an order for the release of a prisoner can be upset on appeal. This means that in the event of a successful appeal an applicant who has already been released will be liable to be detained afresh. There is a provision in the Act (s. 5) for the Divisional Court or Court of Criminal Appeal to order the detention, or, alternatively, the admission to bail, of a defendant where the prosecutor immediately after the decision is granted leave to appeal to the House of Lords. Where such order has not been made and thus the applicant has regained his liberty, a defendant will not be liable again to be detained as a result of a decision against him by the House of Lords on the appeal. Those who not unnaturally are critical of the conferment of a right of appeal on the respondent to a writ of habeas corpus, are at least assured by this provision against a prisoner who has obtained his discharge as a result of a successful application being again imprisoned. If he is released pending the appeal, he will be on bail; otherwise he will not be released, unless the court in granting leave to appeal refused to order his continued detention. In that event he will not be liable again to be detained as a result of an adverse decision of the House of Lords.

E. C. S. WADE.

ADMINISTRATIVE LAW—REMEDIES—PERSON AGGRIEVED—PLANNING
PERMISSION

A "person aggrieved" is often entitled by statute to appeal or to seek some other remedy, and on the face of it there should be no

difficulty in deciding who is a man with a grievance. But the phrase has caused great trouble in the courts, by being given a restrictive interpretation. A particularly important example occurs under the Town and Country Planning Act, 1959, s. 31. Following a familiar pattern, this provision restricts to six weeks the period in which a wide range of planning orders and decisions may be challenged by any person who is aggrieved. The question whether neighbours could claim to be "aggrieved" for this purpose arose for the first time in *Buxton v. Minister of Housing and Local Government* [1960] 3 W.L.R. 866. Salmon J. held that the answer was in the negative.

A company, wishing to dig chalk on its own land, had applied for planning permission and had been refused. The company then appealed to the Minister and the usual local inquiry was held by an inspector, at which four neighbouring landowners appeared and objected to the proposed use. The inspector recommended that the appeal should be dismissed, finding that there was a serious danger that chalk dust would be deposited on the neighbours' land in injurious quantities. One of the neighbours, for instance, had spent large sums of money on his land for purposes of landscape gardening, ornithology, pig-rearing and horse-breeding, and might well be alarmed (as the learned judge observed) at the danger of chalk dust. But in the end the Minister rejected his inspector's recommendation and allowed the appeal. The neighbours then challenged the legality of that decision, alleging that the Minister had relied on information from another government department which they had been given no opportunity of contesting, and that he had decided inconsistently with another decision affecting land close by. These arguments were never tested, for the Minister succeeded on the preliminary point that the neighbours were not "persons aggrieved" within the meaning of the Act, under which alone they could proceed.

"In the widest sense of the word," said Salmon J., "the applicants are undoubtedly aggrieved. In my judgment, however, I am compelled to restrict the meaning of the words 'persons aggrieved' to a person with a legal grievance." He quoted the remark of James L.J. in *Re Sidebotham* (1880) 14 Ch.D. 458 to the effect that a "person aggrieved" is not merely a man who is disappointed, but "a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." Salmon J. pointed out how little the planning legislation is concerned with the rights of neighbours. No one can appeal against a

grant of planning permission at all: appeal lies only against refusal, or against restrictive conditions. If, therefore, the local planning authority had granted the application in the first place, the neighbours would have been powerless. Furthermore, they had not even a legal right to appear at the inquiry, for that right is confined to applicants and planning authorities by sections 15 and 16 of the Town and Country Planning Act, 1947. The learned judge added: "No doubt it was the practice of inspectors appointed under section 15 very sensibly to hear any member of the public who desired to be heard, even although he had no right to be heard." But it did not follow that such parties, if heard, had any rights in the matter. The object of the planning legislation was to restrict development in the public interest, and not to confer new rights on individuals, whether living far away or near at hand. Conversely, it did not legalise nuisances, so presumably the neighbours' proper remedy was to sue for damages or an injunction if any actionable nuisance was in fact committed or threatened. But the mere grant of planning permission to another person could not make them legally "aggrieved," for that person was merely being authorised to do what before the Act he could have done anyway.

This is forceful reasoning. But is it entirely satisfactory? Salmon J. himself pointed out that the words "person aggrieved" had been given a very much wider meaning in a line of authorities dealing with certiorari, but that those authorities had not been cited in the argument before him. This seems a pity, for the law of certiorari was very relevant, even though the remedy in question was statutory. The object of section 31 of the Act of 1959 was to provide that the various orders and decisions "shall not be questioned in any legal proceedings whatsoever" except during the permitted six weeks, and then only on the grounds that they were *ultra vires* or that the statutory requirements had not been complied with. This remedy is given to any "person aggrieved." Had it not been given, the validity of the various orders and decisions could have been challenged in the ordinary way by certiorari. Now the rules as to *locus standi* for the prerogative remedies have always been generous, since there is a general public interest in making sure that inferior jurisdictions and statutory authorities do not act outside their proper powers. It is a matter of public order as well as of private right. The court will act, if it thinks fit, on the motion of a member of the public, although it always retains discretion to refuse to assist a busybody. On this the authorities run harmoniously from *R. v. Surrey Justices* (1870)

L.R. 5 Q.B. 466 to *R. v. Thames Magistrates' Court, ex p. Greenbaum* (1957) 55 L.G.R. 129 (C.A.).

Now if one thing is clear, it is that "person aggrieved" is a highly ambiguous expression. Indeed, the judges have vainly begged Parliament to abandon it for this reason: see the protest of Lord Parker C.J. in *Ealing Corporation v. Jones* [1959] 1 Q.B. 384 at 390, adopted by Salmon J. in the present case. Surely, then, in an Act which contains a drastic privative clause giving a limited substitute for certiorari, this important remedy should not be cut down more severely than is plainly provided by the Act. To look merely at the effect of the planning legislation on private rights would seem to ignore the fact that a vast new piece of administrative machinery has been set in motion, and that there will be a legitimate public grievance if statutory authorities are allowed to act unlawfully. The judges have long acknowledged this principle in awarding certiorari. An example to the present point is *R. v. Hendon R.D.C., ex p. Chorley* [1933] 2 K.B. 696 (a case held in affection by teachers of law), where certiorari was granted to quash a grant of planning permission to which a neighbour objected on the ground that the local council had acted *ultra vires*. Might not the same liberality be shown in interpreting obscure words in a statute?

H. W. R. WADE.

LICENSING JUSTICES—BIAS—DISQUALIFICATION—LICENSING ACT, 1953

THE decision of the Court of Appeal in *R. v. Barnsley C.B. Licensing Justices, ex p. Barnsley and District Licensed Victuallers' Association* [1960] 3 W.L.R. 305 (unanimously affirming the majority decision of the Divisional Court reported at [1959] 2 Q.B. 276) is a reminder that the common law rules of disqualification of judges through bias are, like all rules of the common law, subject to modification by statute.

The Barnsley Co-operative Society applied to the Barnsley licensing justices for a spirits off-licence for their central drug-store. Of the seven justices who heard the application and granted the licence, six were members of the society and the seventh was the wife of a member; the chairman of the justices on this occasion had some months before unsuccessfully stood for election as a director of the society. Each member of the society not only owned at least one share on which he received some annual interest, but also was entitled to a "dividend" based on the amount of his purchases over a period. At the relevant time, the dividend was such that a member who had bought a bottle of whisky would at

the end of the period receive back approximately 2s. 9d. There was no direct evidence that, in hearing the application, the justices were influenced by their membership of the society, or that the chairman hoped that the granting of the licence would improve his chances as candidate for a directorship, or indeed that he even intended to stand again.

But in these circumstances, having unsuccessfully opposed the society's application before the justices, the local Licensed Victuallers' Association applied to the Divisional Court for an order of certiorari to bring up and quash the decision, relying on the common law principle that "no man shall be judge in his own cause." To succeed in a claim of disqualification through bias, it is not necessary, nor would it be often possible, to inquire into the judge's mind so as to establish actual bias swaying the decision. On the authority of *R. v. Rand* (1866) L.R. 1 Q.B. 230 (approved in *R. v. Sunderland JJ.* [1901] 2 K.B. 357) it is enough to prove either (a) that the judge has a direct pecuniary interest, however small, in the subject of inquiry (when the common law raises a conclusive presumption of bias) or (b) that in all the circumstances there is a real likelihood of bias.

It is clear that the Barnsley justices had a direct pecuniary interest in the application sufficient, apart from statute, to disqualify them under (a). But the Licensing Act, 1953, makes detailed provision for the disqualification of justices from acting in licensing matters, and the court had to consider the effect of this Act upon the common law rule. Section 48 of the Act not only sets out general disqualifications (for example, through being in business as a brewer or distiller) but also in subsection (4) makes particular disqualification of any justice from acting in any case that concerns any premises "in the profits of which he is interested." The Court of Appeal considered that this somewhat elliptical expression meant interest "in the profits of the trade or business carried on on the premises" and that the interest of the Barnsley justices fell exactly within this ground for disqualification, the dividend payable on purchases being dependent on the society's profits, including those from the drug-store. But, although the justices were disqualified and might be personally liable to statutory penalties for having acted when disqualified, the validity of the licence which they had granted was protected by section 48 (5): "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification. . . ."

The Court of Appeal, like the majority in the Divisional Court, held that the rule in *R. v. Rand* with regard to direct pecuniary

interest was excluded to the extent to which section 48 had effect, and that section 48 (5) saved from certiorari any decision of justices whose disqualification lay within section 48. Only Salmon J. (dissenting in the Divisional Court) considered that the common law rule continued to exist parallel with the statute. All judges agreed that section 48 (5) would not protect any act done by justices when there was evidence of common law bias outside the statutory grounds of disqualification: hence the decisive importance of the court's opinion that the justices' interest fitted neatly within the four corners of section 48 (4). For, in the words of Ormerod L.J., "If . . . the justices had some direct pecuniary interest in the premises other than an interest in the profits of the premises, then the principle in *R. v. Rand* would still apply and the act would be invalidated in spite of the provisions of section 48 (5) of the Act of 1953."

But apart from any question of direct pecuniary interest, it was common ground that the Act of 1953 would not save the licence from an order of certiorari if a real likelihood of bias was established on the evidence. Here too the Court of Appeal found against the Licensed Victuallers' Association. As Ormerod L.J. said, there was "nothing . . . to justify the submission that the very existence and influence of the co-operative society was such that to be a member must be an indication of bias if a question of this kind came before the licensing bench." Nor did the court consider the chairman of the bench to be in any different position, rejecting the inference that his prospects of election as a director of the society would be likely to be enhanced by the granting of the licence. However the court agreed, following *R. v. Hertfordshire JJ.* (1845) 6 Q.B. 753, that had the chairman been disqualified, his disqualification would have tainted the whole bench.

Devlin L.J. had more difficulty than the rest of the court in finding that there was no real likelihood of bias: in his view, this was a borderline case which came very near the mark. He was certain that justice had not manifestly been seen to be done, and that some impression of bias might reasonably have got abroad. But the true test was whether the court (and not, one might interpose, the man in the Barnsley street) could satisfy itself on the evidence before it that there was a real likelihood of bias. Devlin L.J. emphasised that proof of actual bias was not necessary, and that a court may conclude that there was a real likelihood of bias "without impugning the affidavit of a justice that he was not in fact biased."

The decision of the court, and in particular the judgment of Devlin L.J., go some way towards answering the pertinent question

of Professor de Smith: "What is the position if the court is satisfied, on the evidence before it, that there was no real likelihood of bias, but is nevertheless of the opinion that a reasonable man, at the time when the decision under review was made, could well have expected that the tribunal would be biased? Does the public interest nevertheless demand that the original decision be set aside?" (*Judicial Review of Administrative Action*, at p. 150). In such circumstances, not very dissimilar from those in the present case, it seems likely that the original decision would not be set aside, at least by the present Court of Appeal. Their decision takes its place after *R. v. Camborne Justices, ex p. Pearce* [1955] 1 Q.B. 41, in the current trend away from the former extreme attitude of the superior courts towards bias. The dictum of Lord Hewart C.J. in *R. v. Sussex JJ., ex p. McCarthy* [1924] 1 K.B. 256 that justice must not only be done, but should manifestly be seen to be done, may still be valuable as a guide to the conduct of justices but it is not to be used to ground an application for certiorari. "Mere suspicion," and even "reasonable suspicion," are not enough: there must be a real likelihood of bias in the eyes of the superior court considering the evidence. This trend necessarily brings with it difficulties of demarcation, but may be justifiable in view of the generally high standards of judicial impartiality now displayed on the local bench.

A. W. BRADLEY.

OFFER FOR SALE—OFFENSIVE WEAPONS—BINDING OFFER TO SELL

Fisher v. Bell [1960] 3 W.L.R. 919, and *Mella v. Monahan* (*The Times*, January 20, 1961) make sad reading. A flick knife exhibited in a shop window and a packet of dirty pictures displayed in a shop, each with a price ticket attached, are not "offered for sale" within the meaning of the Restriction of Offensive Weapons Act, 1959, and the Obscene Publications Act, 1959. In each case a Divisional Court of the Queen's Bench Division found in favour of the accused with great reluctance but felt that it could do nothing else because: "It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country." The court comforted itself by noting that other draftsmen of other statutes had used the phrase "offer or expose for sale" or had given a wider meaning to "offer" in a definition section. So the draftsman's sparing use of words in the 1959 Acts has resulted in a nonsense unintended by

the legislature and baffling to the layman. Were the decisions inevitable? Must "offer for sale" always mean a binding offer to sell capable of conversion into a contract by acceptance? Is *Pharmaceutical Society of Great Britain v. Boots Cash Chemists* [1953] 1 Q.B. 401 the general law of the country as to the meaning of "offer" in all circumstances? "Offer" and "offer for sale" have for many years been used in a different sense in the Companies Acts (Companies Act, 1948, ss. 39, 45). A court which justified its earlier decision that a prostitute solicits in a street when she is not in a street (*Smith v. Hughes* [1960] 1 W.L.R. 830) by considering the mischief aimed at by the relevant Act, might perhaps have adopted a more liberal interpretation when considering the mischiefs of flick knives and pornographic photographs. Courts in the past have been able to hold that "void" may mean "voidable" in appropriate circumstances. Would it really have been "a naked usurpation of the legislative function" to hold that "offer for sale" may mean "offer with a view to sale" as distinct from "binding offer to sell," when the context requires such a meaning and the draftsman's actual intention, and Parliament's notional one, are abundantly clear? Amending legislation is already before Parliament but it is depressing to think that statutory tautology may have been encouraged.

F. J. ODGERS.

CORPORATE BODIES' CONTRACTS ACT, 1960

ONE of the minor but nonetheless welcome fruits of the Law Reform Committee's labours is the Corporate Bodies' Contracts Act, 1960. Companies formed under the Companies Acts have the benefit of section 32 of the Companies Act, 1948, which allows them to make contracts through agents expressly or impliedly authorised. Although common sense obviously demanded a similar rule for other corporations, the common law allowed it only to trading corporations, so that contracts made by (for example) municipal and educational corporations were void unless made under their seals. There were certain exceptions of indefinite scope, but the law was most unsatisfactory. Furthermore, the courts held that section 74 (2) of the Law of Property Act, 1925, which seemed designed to meet the difficulty, was ineffective. These difficulties, together with the Eighth Report of the Law Reform Committee (1958, Cmnd. 622), were discussed briefly in [1959] C.L.J. 28.

The new Act puts matters right in the way the Committee recommended. It follows the precedent of the Companies Act closely. Accordingly for corporations falling outside the Act it

provides that contracts normally required to be in writing, signed by the parties to be charged, may be made on the corporation's behalf in writing signed by any person acting under its authority, express or implied; and that contracts that can normally be made by parol can be made by parol by any person acting under similar authority. The contract will then bind the corporation "and its successors," referring presumably to the successors of corporations sole such as bishops. The same formalities apply to variation and discharge. The power to contract under seal, when desired, is preserved. Contracts made, varied or discharged before the Act are not affected, but authority given before the Act is effective for things done after the Act. These are useful and necessary reforms.

H. W. R. WADE.

SALE OF GOODS—AGENT—RELIANCE ON SELLER'S SKILL AND JUDGMENT

THE distinction between agents or servants and independent contractors is more familiar in tort than in contract, but in *Ashford Shire Council v. Dependable Motors Proprietary Ltd.* [1960] 3 W.L.R. 999 such a point arose in connection with section 19 (1) of the Sale of Goods Act, 1923–1953, of New South Wales which, identically with section 14 (1) of our own Sale of Goods Act, 1893, provides: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: . . ."

The Shire Council of Ashford, New South Wales, needed a tractor for road construction and repair. The shire clerk asked B, who had recently been appointed shire engineer but had not yet taken up employment with the council, to inspect a tractor offered for sale by the respondents. Despite conflicting evidence, it was assumed that B made known to C, the respondents' managing director, that the tractor was required for road work and relied on C's assurance that that was just the work for which the tractor was built. B then simply told the shire clerk, without recounting what had passed between himself and C, that the tractor seemed to have plenty of horse-power and was big enough for the work required. When informed of this report the president of the council instructed the clerk to buy the tractor which, being in fact designed for agriculture, soon proved unequal to road work.

The respondents admitted that the tractor was of a description

which it was in the course of their business to supply. But they denied liability under section 19 (1) on the grounds that "the buyer" (*i.e.*, the council as opposed to B) had not made known to them the particular purpose for which it was required, or had not made that known "so as to show that the buyer relies on the seller's skill or judgment," and had not in fact relied on their skill or judgment. B, they argued, was not the council's agent but an independent expert; if he told C the purpose for which the tractor was required, and relied on C's skill or judgment as to its suitability for that purpose, he did so not on behalf of the council but simply to form his own opinion of the tractor's fitness, and it was solely on that opinion that the council relied.

The judges of the various Australian courts were sharply divided on the inferences as to B's status to be drawn from some laconic telephone conversations between the clerk, B and the president of the council. In the High Court of Australia three judges held for the respondents, concluding that the council relied solely on the opinion of B who was not their agent but an independent expert, whilst Dixon C.J. and Kitto J. drew the opposite conclusion ((1959) 101 C.L.R. 265 *et seq.*). The majority view is perhaps best expressed by McTiernan J. (*ibid.* p. 281): "It seems to me to be a contradiction to say that an expert appointed by a person proposing to buy a commodity, to advise him whether or not he should do so, is an agent by whom that person manifests to the person who has the commodity for sale that the former relies on his skill or judgment."

The Judicial Committee, however, concluded that B was the council's agent. As shire engineer-designate, he was asked to "do gratuitously what it would have been his duty to do if he had already become the appellants' servant." Consequently he had authority on the council's behalf both to make known to the sellers the particular purpose for which the tractor was required and to rely on their skill or judgment as to its suitability. Once this inference was drawn it was immaterial that the council's agents who decided to buy the tractor (the president and clerk) were not told of what passed between the sellers and the council's other agent (B) who examined the tractor. A corporation has no mind of its own and can only act through its agents or servants. The sellers' assurances received on the council's behalf by B induced his report to the other agents of the council, which in turn induced them to buy on the council's behalf. The chain of reliance on the sellers' skill or judgment was thus complete.

Unless the go-between in such cases is clearly an expert on the type of goods to be bought (which B was not), it would seem safer,

in the absence of clear evidence, to infer not that the prospective buyer intends to rely solely on that person's assessment of the goods for the particular purpose indicated, but that he is appointing an agent more capable than himself of discussing their suitability intelligently with the seller. In that case he may well be relying, through his agent, substantially, though not necessarily exclusively, on the seller's skill or judgment—which has been held sufficient: *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.* [1934] A.C. 402, 427–428, *per* Lord Wright.

Perhaps the moral is that where, as is all too often the case, the contract contains some regrettably wide clause excluding all conditions and warranties, a buyer would be wise to appoint some independent expert to examine the goods and should rely on that expert's nevertheless fallible opinion as to their suitability for his particular purpose. But where, as here, there is no such clause, he would be wiser to appoint a knowledgeable agent who should ask pertinent questions on his behalf but nevertheless make it clear that the buyer, through him, is still relying on the seller's skill or judgment as to the goods' suitability.

J. W. A. THORNELY.

SEPARATION DEED—SUPPLEMENTAL AGREEMENT—CONSIDERATION—
INTENTION

Horton v. Horton [1960] 3 W.L.R. 914 provides a neat example of the familiar principle that forbearance from suit, even on a doubtful claim, is valid consideration for a new agreement. It also provides—and this may be the aspect of the case more striking to the layman—an equally neat example of the law's occasional ability to frustrate a man's innocent and reasonable intentions. That the fault lies less with the common law itself than with the practice which is enshrined in the Income Tax Act of making the citizen an unpaid tax collector may salve the conscience of the lawyers, but it is poor consolation to anybody else.

By a separation deed of 1954 the husband-defendant covenanted, *inter alia*, to pay his wife “the monthly sum of £30” and, since he then proceeded to pay her £30 per month, it is reasonable to believe that he supposed his words to mean what they said. If and in so far as the question of income tax crossed his mind, he probably thought that this was a matter between his wife and the Revenue authorities. At all events it is clear that he did not know that on their “true construction” the words required him to deduct tax from the £30, account for the tax to the Revenue and pay his wife the balance.

This "true construction" was, however, known to the wife's solicitor whom she consulted some time later when she was minded to augment her income by going out to work. He at once observed that, if the husband changed his mind and elected to deduct tax from the £30 and if the wife's income were augmented by her earnings, she might suffer loss by being unable any longer to claim the full rebate of tax from the Revenue. A supplemental agreement was therefore drawn up and signed by the husband—though without his receiving independent advice—whereby it was provided that instead of "the monthly sum of £30" the husband should pay "the monthly sum which after deduction of income tax shall amount to the clear sum of £30." This, of course, increased the husband's liability by the amount of tax due on each instalment, making the total appreciably in excess of £30.

How much explanation the husband received from the wife's solicitor before he signed the supplemental agreement does not appear from the report, but it seems likely that he supposed the whole business to be a mere technicality. After signing the agreement he simply continued to pay his wife £30 per month until, four years later, he received a substantial demand for tax. He then stopped payments to his wife altogether, and the main question in her consequent action was whether she could sue on the supplemental agreement or only on the original deed. This depended upon whether the agreement, which was not made under seal, was supported by consideration.

The Court of Appeal held that the agreement was made for consideration, and they put the matter in this way. The original deed did not represent the true intention of the parties. Therefore the wife could have made some claim for rectification of the deed, and her claim would have had at least some chance of success. The supplemental agreement was made in consideration of the wife's forbearance from taking rectification proceedings and so was enforceable against the husband.

This is an attractive argument—despite the fact that the wife never actually made any claim for rectification and had probably never even heard of rectification before the trial of the action—and logically it is compelling. But the trouble is that once again the husband's intentions were frustrated, for by the supplemental agreement he had to pay and his wife would receive more than £30 per month. As counsel for the husband observed, in order to give the wife just £30 per month, it should have been provided that the husband pay £30 after deduction of tax and the wife repay to the husband anything she recovered from the Revenue by way of repayment of tax.

That the husband's intention proved so difficult to achieve was in large measure due to the fact that he had an insufficient fund of taxed income for him to pay £30 per month and retain the whole of the tax "notionally" deducted. Had his taxed income been larger he would not actually have had to pay anything extra on the sums due to his wife, but this is not an explanation that he is likely to find satisfactory. Nor can he really have found much consolation in Upjohn L.J.'s statement that, "the trouble arises not because he has been badly advised but because he has entered into this document without any advice at all. No doubt, had he been advised, he would have been warned of two matters: first, that his wife would under the document which he was being asked to sign get more than £30 a month spending money, and secondly, that, having regard to his own financial position, he would himself have to account for some part of the tax notionally deducted to the Inland Revenue." It may be inevitable that our income tax law is complicated, but it does seem that something is wrong if it is impossible for a man to enter into an effective agreement to pay his wife £30 per month without first obtaining expert legal advice.

J. A. JOLOWICZ.

CONTRIBUTORY NEGLIGENCE—DUTY—APPORTIONMENT

IN *Nance v. British Columbia Electric Railway Co. Ltd.* [1951] A.C. at p. 611, Viscount Simon said: "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury." Similar views have been expressed in a number of other cases (e.g., *Davies v. Swan Motor Co., Ltd.* [1949] 2 K.B. 291; *Ellerman Lines, Ltd. v. Grayson (H. & G.), Ltd.* [1919] 2 K.B. 514, 535, [1920] A.C. 466, 477; *Lewis v. Denye* [1939] 1 K.B. 540, 554-555). Viscount Simon added, however, that the question of duty might nevertheless arise in a situation where both parties are so moving in relation to each other as to involve the risk of collision. Probably it is this idea that underlies the statement of Stale J. in *Dawrant v. Nutt* [1960] 3 All E.R. 681, 683, that "where some measure of negligence on the part of the motor driver is established, then any defence of contributory negligence must involve that something was done or omitted, or permitted, by the plaintiff which was a breach of the legal duty to, among other persons, the defendant."

The facts of this case, which raises points of interest, were that the plaintiff, Mrs. Dawrant, was a passenger in the side-car of a motor-cycle combination driven by her husband when they collided with a motor-car driven by the defendant. The collision occurred at night along a straight but dark stretch of road. Negligence in the defendant seems to have been accepted, and it was also proved that the motor-cycle was showing no front lights at the time and that both Mr. and Mrs. Dawrant were aware of this fact. The plaintiff was injured and her husband was killed. She brought an action in respect of her own personal injuries and another under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846. The principal question in the first action was how far the plaintiff's knowledge that there were no forward lights amounted to contributory negligence in herself. Stable J. held that it did and referred to *Dann v. Hamilton* [1939] 1 K.B. 509, although this case had been decided on *volenti non fit injuria* and contributory negligence had not even been pleaded despite the efforts of the trial judge to induce counsel to do so: (see Lord Asquith's note in (1953) 69 L.Q.R. p. 317). It seems odd that on the question how far the plaintiff's knowledge of a danger constitutes contributory negligence the only allusion should be to a decision which had nothing to do with contributory negligence merely because that defence might have succeeded had it been pleaded. *Slater v. Clay Cross Co., Ltd.* [1956] 2 Q.B. 261, perhaps, would have been more relevant. The fact that in the present case *volenti non fit injuria* was not even considered shows that since the Law Reform (Contributory Negligence) Act, 1945, the courts are disposed to deal with cases on the footing of contributory negligence, for they can then apportion damages between the parties fairly, rather than on the footing of *volenti*, which either fails or succeeds completely. One wonders what is left of *volenti*.

For the proposition that contributory negligence is based on a duty of care no authorities are quoted. This being a decision at assizes, there was probably little opportunity for a wealth of citations. But if, as appears from the judgment, *Dann's* case was the only one cited by counsel, the situation is ironic, for it is now clear that any criticism of that case should be levelled more appropriately at counsel's presentation of the case than at the judgment.

Where a defendant counterclaims against a plaintiff, it is true that he must then prove a duty in the plaintiff towards him. But this is because the plaintiff figures as defendant in the counterclaim. The possibility mentioned in *Nance's* case of reciprocal duties being owed by two parties, who are both in motion, might stem from the fact that in such a situation either or both of them

might be injured, and whichever is in fact injured, he can only succeed if he proves a duty of care in the other. Basically the point is that the party inflicting the injury must owe a duty to the party injured. In contributory negligence, on the other hand, the question is whether the injured party owes a duty to the other, not as regards any damage sustained by that other, but by himself. The answer should be in the negative, for the function of the duty concept is always to establish initial liability in the party who is to be liable by determining whether the situation is one which the courts regard as actionable and whether, on the facts, that person behaved carelessly towards the party claiming damages. These considerations are irrelevant to deciding the contributory negligence of the claimant, for, whether both parties happened to be moving or not, the sole question is whether there was any want of care on his part which led to his own damage: see Greer L.J. in *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* [1936] 2 All E.R. at p. 1151. It is submitted with respect, therefore, that the statement that the plaintiff must be under "a legal duty to take reasonable care for his own safety" is inappropriate as applied to contributory negligence, although it might conceivably be useful in the "rescue" type of case (*cf. Baker v. T. E. Hopkins & Sons, Ltd.* [1958] 1 W.L.R. at p. 1004).

Two further points arise in this case. As between the defendant and Mrs. Dawrant, the defendant was held three-quarters to blame and Mrs. Dawrant one-quarter. Her claim for personal injuries, therefore, was reduced by her quarter share in the blame. As between the defendant and Mr. Dawrant, the blame was apportioned equally. Hence the general and special damages in her second action under the Law Reform and Fatal Accidents Acts were reduced by half. We are not told specifically that she was awarded half under each Act, but this seems to be implied. Damages under the 1934 Act, which continues the deceased's own action for the benefit of the estate, are normally reduced in proportion to the deceased's own share in the blame. The interesting point here is that the personal representative who brought the action on behalf of the estate, namely, Mrs. Dawrant, was herself to blame though in a lesser degree. Are we to infer from the award of half the damages to the estate that even if the personal representative had been more to blame than the deceased, it is still the deceased's share of the blame that has to be taken into account? The next point concerns Mrs. Dawrant's claim as dependant under the Fatal Accidents Act. Section 2 (4) of the Law Reform (Contributory Negligence) Act, 1945, identifies a dependant with the contributory negligence of the deceased and says that the damages

“shall be reduced to a proportionate extent.” The question is whether the proportion refers only to the deceased’s share in the blame or whether it could also refer to the dependant’s own share. The fact that her claim as dependant seems also to have been reduced by half, even though her own share in the blame was less, might suggest that here, too, it is the deceased’s share that is relevant. Possibly her negligence on the present facts should not be regarded as having been causally connected with his death. Such a supposition raises an interesting point of causation, especially if this case is compared with *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 663. For, adapting the *Stapley* line of reasoning, Mrs. Dawrant could be said to have contributed causally to her husband’s death in so far as he might not have ridden on the motor-cycle had she refused to accompany him. Suppose, further, that it was Mrs. Dawrant who had been killed, and that Mr. Dawrant sued as her dependant: would his claim be reduced by only her quarter share in the blame, he being identified with her contributory negligence notwithstanding the fact that he bore a greater share; or would it be reduced by half, since he was more responsible for her death than she herself? The case cannot unfortunately be regarded as answering these questions as the apportionment of damages is touched on but lightly in the concluding paragraph.

R. W. M. DIAS.

DUTY OF MANAGER OF COAL MINE—DUTY OF CARE, DUTY OF
INSURANCE, INTERMEDIATE DUTIES

IN *Brown v. National Coal Board* [1960] 3 W.L.R. 892 the Court of Appeal engaged itself in an extremely interesting and wholly academic argument about the nature of the duty imposed upon the manager of a coal mine by section 48 (1) of the Mines and Quarries Act, 1954 (here termed the Act). Though the court unanimously affirmed the decision of Thesiger J. (reported [1960] 1 W.L.R. 67), who refused a remedy to the plaintiff injured in an accident in the mine, Lord Morris of Borth-y-Gest and Pearce L.J. expressly differed about the character of that duty; and the third member of the court, Pilcher J., though conscious of the difficult situation in which he found himself, categorically accepted Pearce L.J.’s view. Leave to appeal to the House of Lords was granted.

At first instance various other sections of the Act as well as negligence at common law were discussed; but the trial judge preferred the view of the overman to that of the plaintiff where

they differed, and on the simplified version of the facts accepted in the Court of Appeal, the issue was confined to a consideration of the effect of section 48 (1) of the Act, and the relevant "escape clause" section, 157.

The facts are well summarised by the reporter at p. 69 of [1960] 1 W.L.R. and may be sufficiently stated as follows. A tub coming up a drift or road knocked away one of the concrete posts carrying a girder which supported the roof. The girder collapsed at the damaged end and a piece of stone at once fell from the roof. The overman decided to put in a prop to support the partly fallen girder. In the centre of the girder was a light fitting. It would have been difficult to insert the prop unless the light fitting was removed. The plaintiff, an electrician who had finished his work on that shift and was returning to the shaft bottom, was summoned back by a boy sent by the overman. Having come back the plaintiff (who knew from the boy what was required) immediately set to work to remove the fitting; but the overman (as it was held, after a conflict of evidence) was not aware that the plaintiff had come back. Whilst the plaintiff was by the girder selecting a spanner to do the job, another large piece of stone fell and injured him. It was accepted for the purpose of argument in the Court of Appeal that the Coal Board was liable only if there had been a breach of the statutory duty cast upon the Board by section 48 (1) of the Act, the trial court having found that there had been no common law negligence nor any breach of any other statutory duty.

Section 48 (1) provides that "it shall be the duty of the manager to take . . . such steps by way of . . . supporting the roof and sides of the road . . . as may be necessary for keeping the road . . . secure." Section 157 provides that "it shall be a defence . . . to prove that it was impracticable to avoid or prevent" the relevant breach of duty.

Counsel for the plaintiff submitted that the duty so created was an absolute duty: which may perhaps be most simply stated in the form that the fall of the stone of itself demonstrated that the "steps necessary for keeping the road secure" had in fact not been taken; and that therefore (unless it was affirmatively shown that the steps necessary to prevent the actual accident were impracticable—which strictly was not attempted) the Coal Board was liable. It was part of his argument that section 48 of the Act represented section 49 of the Coal Mines Act, 1911, which had provided that "the roof and sides of every travelling road . . . shall be made secure," that the 1911 Act reproduced the words of the 1887 Act which itself reproduced the 1872 Act; that it had

been decided that the duty under the 1911 Act was, subject to its escape clause (s. 102), absolute; and that it was inconceivable that a shift in phraseology from the passive to the active mood should be construed as indicating an intention on the part of Parliament today to diminish a duty so long recognised to be owed to the miner.

Pearce L.J. preferred what was in his view the "plain meaning" of the words of section 48 (1). These words, especially when compared with the wording of other sections of the Act, clearly indicated that the duty "to take such steps as may be necessary for keeping the road secure," did not amount to a duty to "ensure that the road shall be kept secure." Parliament would evidently have used the latter terms (which indeed it approaches in other sections) if it had intended in this section to create the kind of duty for which the plaintiff's counsel contended. Moreover the extent to which the miner's real position had been prejudiced was much less shocking than *prima facie* appeared, since the positive obligation of the 1911 Act, as much as that of the 1954 Act, had to be construed in the light of the "escape clause" section in each Act; and the escape clause of the 1911 Act was perhaps slightly wider than that of the 1954 Act. In the Lord Justice's view "the artificial abstract conception of absolute liability . . . has been discarded in the Act of 1954 in favour of the real concept of an efficient person taking steps which are necessary in the light of knowledge which it is possible for him to possess." The Lord Justice emphasised that the necessary steps are the steps which can be judged to be necessary before the event; for "if 'such steps as may be necessary' meant 'steps which after the event are shown to be necessary' [the manager] would be put, subject to the escape clause, in the position of an insurer. For in nearly all cases of (for instance) collapse of a roof it is possible by subsequent investigation to find steps, which, had the unknown been known, could have successfully prevented the collapse."

It is from this view that Lord Morris dissented. So to define the duty would be to equate the statutory duty with the common law duty of care. A manager would clearly be negligent if he failed to inform himself fully and to take those steps which a competent person thus informed would judge to be necessary. Moreover, in respect of those steps, the escape clause would be idle, for no steps necessary in that sense could be impracticable. And further, in Lord Morris's view, "if a section begins with the words 'It shall be the duty' it seems to me that an absolute duty is being imposed, and the words that follow must then be looked at to see the nature and extent of the duty which is imposed." "The inquiry would

not be whether the manager had been negligent. . . . A step which is necessary is nonetheless necessary even though it is not known to be necessary and even though somebody was not negligent in not knowing that it was necessary." Nevertheless Lord Morris rejected the contention of plaintiff's counsel "that the manager must 'ensure' that the road or working place is kept secure. That is not what is said . . . What is said in section 48 is that the manager must take such steps as are necessary for keeping the road secure." And he went on to conclude: "In my judgment the evidence positively negatives any suggestion of failure on the part of the manager down to the moment of mishap, and there is no evidence of any failure during the few minutes that intervened between that moment and the moment when the plaintiff was injured."

Lord Morris's view is of particular interest, for he proposes a type of duty intermediate between a duty of insurance (often called an "absolute duty") and the common law duty of care; and moreover this intermediate duty (termed "absolute" by Lord Morris) is not of the kind usually spoken of as "strict." Pearce L.J. also contrasts "personal" and "impersonal" duties though he seems to depart from the sense of "personal" as previously normally used in this context.

It has often been suggested in these notes that it is of special importance to analyse and specify the duty which the law attaches to defendants in particular situations. And it has also been suggested that the types of duty are more variegated and diversified than is usually admitted. But it is unusual to find a court as consciously concerned to specify the relevant duty as was this court, and rare indeed to encounter a specification as exact and particularised as Lord Morris's. Such accuracy is much to be commended. It is of course a different question whether a miner's right to recover compensation for an accident occurring in a coal mine should depend on this kind of analysis and whether it is reasonable to suppose that Parliament intended it so to depend.

C. J. HAMSON.

NEGLIGENCE—REMOTENESS—THE POLEMIS RULE

IN the recent case of *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd.* [1961] 2 W.L.R. 126, which will no doubt be known to posterity as *The Wagon Mound*, the Privy Council through a judgment delivered by Viscount Simonds have made pronouncements of far-reaching importance, not the least of these being their disapproval of *Re Polemis & Furness, Withy & Co.*

[1921] 3 K.B. 560. The facts were briefly as follows. The defendants (appellants before the Privy Council), negligently allowed a quantity of furnace oil to spill over into the sea while their vessel, the ss. *Wagon Mound*, was being bunkered. This oil spread over the water and came to lie under the plaintiffs' (respondents) wharf, fouling their slipways and interfering with certain welding operations which were in progress. Through a combination of unforeseeable circumstances the oil was set ablaze and extensive damage to the wharf resulted. An important finding of fact was that some damage to the plaintiffs' wharf was reasonably foreseeable as the result of the spillage by way of the fouling of the slipways, but that the fire was unforeseeable because according to scientific opinion at the time of the occurrence the oil, spread as it was in a thin film over cool water, was in no danger of igniting. The Supreme Court of New South Wales, following *Polemis*, held the defendants liable for all the direct consequences of their initial negligence. The Privy Council have now reversed this decision and have declared that *Polemis* was wrongly decided.

There are always two questions in negligence cases: (1) for what consequences, that is, for what kind of damage and what extent of damage, is the defendant liable to the injured party, if he is liable at all? and (2) how much is such legally admissible damage worth for the purpose of assessing the monetary compensation that he has to pay? The Privy Council say that the answer to the first question rests on the foresight of a reasonable man, and that in so far as *Polemis* contradicts this, it is wrong. Now, *Polemis* is capable of two interpretations. One is that once the defendant is shown to have been negligent as regards somebody, he is liable for all the direct consequences, even to one who was not foreseeably endangered by the original negligent act. The Privy Council accept this as the principle underlying *Polemis* (p. 133) and declare it to be wrong. They cite, *inter alia*, *Glasgow Corporation v. Muir* [1943] A.C. 443, *Bourhill v. Young* [1943] A.C. 92, and *Woods v. Duncan* [1946] A.C. 406, in all of which the essential point was that no damage was reasonably foreseeable to the plaintiff. The emphasis placed on this fundamental point is one of the best features of the case. It may incidentally dispose of the suggestion that has been advanced that a doctrine of "transferred negligence" might be recognised in tort analogous to the doctrine of "transferred malice" of criminal law.

There is the alternative interpretation of *Polemis*, which is warranted by the finding of fact in that case ([1921] 3 K.B. at p. 563) and repeated by the Privy Council (at p. 133), that so long as some damage, however slight, was reasonably foreseeable

to the plaintiff, the defendant is liable to him for the full extent of it, provided this additional damage was the direct result of the original negligence. Such an interpretation, though it involves certain difficulties, would enable the case to be reconciled with the three House of Lords cases mentioned above, in which, as pointed out, no damage was reasonably foreseeable to the plaintiffs. Their Lordships quote Denning J.'s doubt in *Minister of Pensions v. Chennell* [1947] 1 K.B. at p. 253, whether *Polemis* could be said to have survived these cases, but it should be pointed out that the same judge seems later to have accepted the second interpretation of *Polemis* when he said, "But the decision in *Re Polemis* is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see *Hay or Bourhill v. Young*, *Woods v. Duncan*, per Lord Russell and per Lord Porter. The second question is whether the neglect of duty was a 'cause' of the injury in the proper sense of that term. . . . It is only when those two preliminary questions—duty and causation—are answered in favour of the plaintiff that the third question of remoteness of damage comes into play" (*Roe v. Minister of Health* [1954] 2 Q.B. at pp. 84–85).

The Privy Council appear to have rejected this latter interpretation also. They point out the absurdity that would follow from it of A and C both sustaining the same unforeseeable damage resulting from B's act, the only foreseeable result of which was some slight damage to A alone, and only A being able to recover full damages (p. 141). Lord Sumner's famous dictum in *Weld-Blundell v. Stephens* [1920] A.C. at p. 984, that foreseeability only "goes to culpability not to compensation" is castigated as "an error which has introduced much confusion into the law" and as being "fundamentally false" (pp. 134, 140); and instead the principle is enunciated that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen" (p. 142) and that foreseeability must be of "the damage which in fact happened—the damage in suit" (p. 141). Some guidance as to what is meant by this is to be found in its application to the facts. It could have been said in both the present case and *Polemis* that the damage "which in fact happened" was still of "the same kind" as that which was foreseeable, namely, damage to property, whether caused by fouling,

chipping or fire. But their Lordships reject this: they regard damage by fire as a different kind of damage to damage by fouling or chipping. What is required is foresight of damage by fire (p. 141). The peculiarity about all this is that fire is the very thing which a reasonable man would have foreseen from the spread of furnace oil; and fire did result. It was reasonable foresight based on expert opinion, which eventually proved to be wrong, that pointed to non-liability. The plaintiffs themselves undoubtedly apprehended fire, for they stopped their welding operations, and it was expert advice that encouraged them to resume. Since they acted quite reasonably in so doing their conduct did not constitute a *novus actus interveniens*. But from all this one can only feel that the foreseeability test is heading towards some strange interpretations. The objective approach to foreseeability, which is becoming so popular, may well become unmanageable.

An element of doubt also persists as to (i) whether the Privy Council would reject liability for the unforeseeable extent of damage, even though some damage of that kind was foreseeable, or (ii) whether they would allow recovery to the full extent of the damage, even though this actual extent was unforeseeable. A, for instance, carelessly drops his lighted cigarette on a pile of what is reasonably supposed to be wood shavings on a stone floor, but which unknown to anybody happens to be inflammable cellulose, and the entire building is burnt down in consequence. It would be reasonable to foresee some damage to the building by fire, a scorched patch perhaps, but not the destruction of the whole of it. The tenor of the judgment suggests that the extent of the damage is also limited by foreseeability. This should prove salutary in so far as a good deal of the prevailing chaos concerning causation, directness and *novus actus interveniens* with all their bewildering criteria could thereby be avoided. It must be observed, however, that questions of causation will not be wholly eliminated, for it must still be proved in all cases that it was the defendant's conduct that inflicted the injury complained of. A possible further simplification is that there may not be any need in future to treat remoteness of damage and breach of duty separately.

If, on the other hand, interpretation (ii) above is adopted, not only will these difficulties remain, but it would make the decision merely a restatement of the *Polemis* principle. On this view the House of Lords could adopt it with the explanation that some damage to the plaintiff of the kind that did ensue (as "kind" is now understood) must have been reasonably foreseeable; and they then need only disapprove *Polemis* as regards the application of this principle to its facts.

Foreseeability as the test of the extent of the damage can itself lead to difficulty, especially in relation to the rule that one has to take one's victim *talem qualem*. There is authority for saying that there is liability to the full extent of the damage if the victim, who possesses an egg-shell skull or suffers from the distressing tendency to bleed, unforeseeably sustains a cerebral fracture or bleeds to death (*Owens v. Liverpool Corporation* [1939] 1 K.B. at pp. 400-401; *Bourhill v. Young* [1943] A.C. at pp. 109-110; *Love v. Port of London Authority* [1959] 2 Lloyd's Rep. 541). The simplest answer is that there should now be no liability for the unforeseen extent of the damage and that the dicta in the above-mentioned cases should be ignored; but this would be most unfair on the victim. Such a solution would at least have the merit of bringing the extent of physical damage into line with purely pecuniary damage, which has been said by the House of Lords to rest on foreseeability (*Liesbosch Dredger v. S.S. Edison* [1933] A.C. 448). But if there is to be full liability in such cases, it is difficult to see how it can be reconciled with the *Wagon Mound* principle save by way of exception. For if the full extent of the injury is somehow regarded as being foreseeable, the "average reasonable man" and "the man on the Clapham omnibus" will have to give way to some new and nameless figure credited with far greater powers than his predecessors. On the other hand, full liability might be justified by giving the *Wagon Mound* principle interpretation (ii). Thus, in the haemophilia type of case, it could be argued that as long as there is foreseeability of laceration, there is to be liability to the fullest extent of that laceration. But that could lead to an absurd distinction between these and the egg-shell skull type of cases. For in the latter it might well be said that if the foreseeable injury is only a bruise, this is a different kind of damage to a fractured skull. If, then, to overcome this difficulty it is said that all that need be foreseen is physical injury from a blow, we seem to back on one of the interpretations of *Polemis*, which the Privy Council have rejected. Perhaps, each of these cases will be dealt with on its own facts.

Some other implications of the Privy Council decision may be touched on briefly. As to nervous shock, their Lordships have endorsed the view that what has to be foreseeable is injury by shock. This disposes of the alternative test of foreseeability of injury by impact. But if the "injury by shock" test is adopted, the ambit of its operation will have to be restricted drastically. There is authority for saying that it is only those who actually see or hear, as opposed to those who are told later, who may recover (*Hambrook v. Stokes Bros.* [1925] 1 K.B. at pp. 152, 159, 165).

Another point is that nothing in the judgment should be taken as affecting assessment of damages, for the topic is not discussed. The question, for what damage is the defendant liable?—to which the foreseeability test applies—is distinct from the question, how much is it worth? The latter is governed by wholly different considerations. That is why the defendant may still find that he has to pay more if his victim happens to be a bank manager than if he is a tramp. Perhaps, this is all that is now signified by the statement that one must take one's victim *talem qualem*. Perhaps also Lord Sumner's epigram that foreseeability only "goes to culpability not to compensation" must be relegated to this context. Whether the so-called "parasitic element" in damages will have been affected remains to be seen. Their Lordships suggest that, generally speaking, foreseeability is the test of liability in tort and contract, though they add the caveat that they do not "assert that in all respects today the measure of damages is in all cases the same in tort and in breach of contract" (p. 136). The difference alluded to may lie in the assessment of damages and not in the measurement of the extent of the damage.

The decision is in keeping with the prevailing tendency to rest tortious liability on fault as far as possible. Their Lordships expressly exclude *Rylands v. Fletcher* from consideration, nor do they deal with the issue of nuisance (p. 142). They stress the injustice of holding a defendant, who has been guilty of a trivial fault, liable for the unforeseeable extent of the resultant damage (pp. 138–139). But is it not equally unjust that the plaintiff, who is wholly innocent, has to shoulder the unforeseeable loss to its full extent? The reference to justice is unhappy, and if this is indeed appealed to it might bring in those very considerations of insurance which Viscount Simonds himself so firmly rejected in *Davie v. New Merton Board Mills, Ltd.* [1959] A.C. at pp. 626–627. It is probable that from henceforth the need to do justice in the individual case may bring about some strained interpretations of what is reasonably foreseeable. One example of this is the way the test has been applied to the facts of the *Wagon Mound* case itself; perhaps the egg-shell skull type of case will prove to be another.

Many of the cases which followed *Polemis* may not be decided differently even now (p. 138). To take but two examples, this is certainly true of *Thurogood v. Van den Berghs & Jurgens, Ltd.* [1951] 2 K.B. 527, where it was reasonable to have foreseen injury to the plaintiff by some part of his body coming into contact with the ungarded blades of a fan, which was precisely what occurred. More doubt, however, might be felt about the recent case of *Schneider v. Eisovitch* [1960] 2 Q.B. 430 (a nervous shock case),

where the plaintiff, who was rendered unconscious in a collision, suffered shock on being informed later that her husband, who had been with her, had been killed (see the Note in [1960] C.L.J. pp. 157–158). If it is necessary that there should be not only foreseeability of injury by shock but also that the plaintiff should see or hear the occurrence, the case might well be decided differently and the plaintiff's claim dismissed. Or would the fact that she had been present, even though unconscious, somehow make a difference?

Finally, it is submitted that the Court of Appeal could either refuse to follow its own decision in *Polemis* or abide by it. If it does not wish to be bound, it could regard as the *ratio decidendi* the wide proposition that a negligent defendant is liable even though no injury was foreseeable to the particular plaintiff provided the damage is the direct result; this being inconsistent with the House of Lords decisions in *Muir*, *Bourhill* and *Woods*, the Court may invoke the rule in *Young v. Bristol Aeroplane Co., Ltd.* and refuse to be bound (the fact that the two former cases were Scottish appeals need raise no technical difficulties—*Donoghue v. Stevenson* was an appeal from Scotland). If, on the other hand, the narrower interpretation of *Polemis* is adopted, it would not be in conflict with the House of Lords decisions, and the Court of Appeal could still regard itself as being bound. It may well do this if it desires to force *Polemis* up to the House of Lords. A different answer must be given as regards the Australian courts. The Privy Council may not be able to overrule *Polemis* as laying down a principle of English law, but they can overrule that principle as a proposition of Australian law. The Australian courts are now bound by the Privy Council and cannot follow *Polemis*, even if they wish to.

Apart from the points already mentioned, the judgment abounds with quotable things. Thus, at p. 133 there is an acceptance of negligence as an independent tort today, and at pp. 140–141 there is a statement of its ingredients as being a duty owed to the plaintiff by the defendant, a breach of that duty and damage, together with an underlining of the point that damage is the gist of the action; at p. 132 it is stated that *Polemis* was decided in tort and not in contract. Another noteworthy point, which underlies the whole case, is the application of the rule that reasonable foreseeability is to be judged according to the state of knowledge at the time of the occurrence, not the trial (*cf. Roe v. Minister of Health* [1954] 2 Q.B. at p. 84). The foresight of the reasonable layman might have rendered the defendants liable, but it was

reasonable foresight based on expert knowledge at that date that absolved them from liability.

The decision is on balance welcome. At the commencement of the judgment the hope is expressed that it may "serve in some measure to simplify the law." A good many points will no doubt arise that will require clarification, but in the main that hope is likely to be realised.

R. W. M. DIAS.

THE WAGON MOUND—A FURTHER COMMENT

THE decision in the *Wagon Mound* is welcomed, even if with modified rapture, by Mr. Dias in his Note on the case (*ante*, p. 28) and it is reasonably foreseeable, at least to readers of the *Law Quarterly Review*, that even more enthusiastic receptions of the case may be forthcoming. It is only with great diffidence, therefore, that a discordant note is introduced and the hope expressed—*forlorn* though it may be—that the House of Lords may some day declare that the law of England on this topic is not the same as the law of New South Wales.

The main theme that seems to run through the Privy Council's opinion is that it is unfair, or unjust, that a defendant should be liable in negligence for damage which he could not reasonably have foreseen, whether or not he could have foreseen that some damage might be suffered by the plaintiff as a result of his conduct. Foreseeability is the test of remoteness of damage as well as of breach of the duty of care, and Lord Sumner's famous dictum that it only goes "to culpability, not compensation" is held to be confusing and wrong. Foreseeability is, however, an elusive concept, and while its use may be inevitable in deciding culpability, it is submitted that there is no reason to suppose that it will work any better than "directness" as the criterion of remoteness of damage.

It is no doubt true that in the great majority of negligence cases the damage actually suffered by the plaintiff is the damage which, it is held, the defendant ought to have foreseen. Alternatively, if the actual damage suffered by the plaintiff is held to have been unforeseeable, it is also held that no damage whatever was foreseeable and the defendant is not liable. But why, when damage of one kind is foreseeable and damage of a different kind is actually caused, is it more just for the plaintiff than the defendant to bear the loss? On the basis that some damage to the plaintiff ought to have been foreseen by the defendant as the likely result of his conduct he ought, generally speaking, to have refrained

from that conduct. Whether or not the damage actually caused was foreseeable does not detract from the culpability of the defendant towards the plaintiff, and in either case the defendant's culpable conduct has damaged the plaintiff. But the plaintiff himself is equally free from blame in either case.

It is submitted that much of the Privy Council's dislike of "directness" is due to its consideration of remoteness of damage in isolation from the associated topics of breach of duty and standard of care. It must be remembered, however, that conduct is not negligent merely because some damage, however slight, is foreseeable as a possible consequence. "It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk" and also, "you must balance the risk against the end to be achieved" (*per* Denning L.J. in *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835, 838). In other words, negligence consists in conduct which, in all the circumstances of the case, subjects the plaintiff to an unreasonable risk of injury. What matters, therefore, is that the foreseeable damage be so great and so likely to occur that the defendant's conduct can in all the circumstances properly be condemned as negligent. Why, then, should a defendant who has been guilty of conduct which by definition involves an unreasonable risk to the plaintiff escape liability merely because the damage actually suffered was different in kind from that which might have been expected?

It is therefore submitted, with great respect, that the *Wagon Mound* provides a rule which, to say the least, will work no more justly than the rule in *Polemis*. It is also submitted that the Privy Council's decision has certain practical disadvantages. As Mr. Dias points out, the foreseeability of the plaintiff's damage by fire was determined in the light of expert evidence—and this despite the Privy Council's own declaration that, "it is the foresight of the reasonable man which alone can determine responsibility." This, it is suggested, cannot but make the working of foreseeability haphazard in the extreme, for it is to confuse *foreseeability* with *probability*. In *Roe v. Minister of Health* [1954] 2 Q.B. 66, for example, a vital fact, of which the defendant's servants were unaware, was that ampoules of anaesthetic solution might suffer "invisible cracks." This fact made it reasonably *probable* that failure to colour the antiseptic in which the ampoules were kept might lead to damage to the plaintiff, but that was not the point. Bearing in mind the knowledge possessed at the time by competent anaesthetists—which did not include knowledge of "invisible cracks"—no damage to the plaintiff was reasonably *foreseeable*

and there was thus no negligence. In the present case, as Mr. Dias observes, the reasonable man in his ignorance would have foreseen the fire which actually occurred, and it was expert evidence—evidence which could only go to *probability*—that turned the scale. Are we to take it, therefore, that a consequence is not foreseeable unless a reasonable man in the defendant's shoes would have foreseen it and expert evidence shows that it was in fact reasonably probable?

The Privy Council expressly leaves out of account the "so-called rule of 'strict liability' exemplified in *Rylands v. Fletcher* and the cases that have followed or distinguished it," but does the decision apply to other branches of the law? What, for example, of the action for breach of statutory duty? If the defendant is shown to have broken an absolute statutory duty, is he now liable only for the foreseeable consequences, and if so, what does foreseeability mean? To commit a breach of an absolute duty the defendant need not have foreseen anything at all, and to suggest that some of the consequences of the breach may be foreseeable and others not borders on the metaphysical. What of a case like *Galashiels Gas Co. v. O'Donnell* [1949] A.C. 275, where the defendants' conduct was wholly blameless and could not foreseeably have led to any damage to anyone? All that they did was to instal a lift which, so far as anyone could discover even after the accident, was in perfect condition. But something, in some unexplained way, went wrong and the plaintiff's husband was killed. The House of Lords held the defendants liable for the breach of their absolute duty, but it is absurd to suggest that the damage was foreseeable. There was nothing upon the basis of which it could have been foreseen.

To some of the objections here raised it may be answered that the difficulties are academic. Foreseeability, it may be argued, is a question of fact for the trial court. The Privy Council expresses the hope that its decision may "serve in some measure to simplify the law," but one is left with the uncomfortable feeling that the "simplification" will benefit only the appellate courts. If foreseeability is a question of fact, then the *Wagon Mound* simplifies the law but, it is submitted, it greatly increases the difficulty of applying the law to the facts of a given case. It also makes the task of counsel advising about the settlement of an action even more difficult than at present. Problems of causation may send him rushing to the Reports, but if he is deprived even of this help in forecasting the decision a judge is likely to reach, he is bound to advise in many cases that the action must be tried. If the *Wagon Mound* leads to a substantial increase in the number

of actions for negligence actually brought to trial, perhaps the House of Lords might be prepared to give *Polemis* another chance.

J. A. JOLOWICZ.

CONVERSION—PARTNERSHIP—FRAUD OF PARTNER—LIABILITY OF BANK

IN *Commercial Banking Co. of Sydney Ltd. v. Mann* [1960] 3 W.L.R. 726 the respondent M, a solicitor, was in partnership with R under an agreement which provided that all the assets of the partnership, including all money in any partnership banking account, were the property of M, but that cheques might be drawn on these accounts by either partner. M had given the necessary authority for that purpose to the A.N.Z. bank where M and R had a trust account in the partnership name. R, in purported exercise of such authority, fraudulently drew thirteen cheques on this trust account with the A.N.Z. bank in the form "Pay Bank cheque favour H. Ward or bearer," and in each case made application in the firm's name "per R" for a bank cheque in favour of H. Ward for an amount equal to those of the cheques. The bank debited the partnership account with the amount of the cheques, and then issued bank cheques payable to H. Ward or bearer for an equal amount. These cheques were taken by Ward to a branch of the appellant bank, where he had an account, and were cashed over the counter. "Bank cheques" in Australia are similar to "bank drafts" as known in the United Kingdom, and are in legal significance promissory notes made and issued by the bank. In due course the cheques were paid by the A.N.Z. bank to the appellant bank against delivery. R was fraudulent throughout, for Ward was not a client of the partnership and no client had authorised the payment to him of any money held in the trust account. When M discovered the fraud it was clear that he had no cause of action against the A.N.Z. bank as that bank had been expressly authorised to cash any cheques signed by R (p. 729).

M therefore sued the appellant bank for £3,505, the amount of the bank cheques, on the ground that it had converted thirteen documents described as bank cheques which, he contended, had become his property when R, or Ward, obtained them from the A.N.Z. bank. The trial judge in the Supreme Court of New South Wales gave judgment in favour of the plaintiff, M, and the defendant bank appealed.

The Judicial Committee of the Privy Council allowed the bank's appeal on the ground that M never had any property in the bank cheques. The argument for M was that R in his capacity as

partner was authorised to draw upon the trust account and so obtain from the bank its bank cheques; therefore the cheques were the property of the partnership and belonged to M, and R could not give a better title to a third party than he himself had. But R was not acting as the agent of the partnership in obtaining the bank cheques because he was not authorised to do so. R's authority only extended to the drawing of cheques for the proper purposes of the partnership. Admittedly R was acting fraudulently in drawing the branch cheques, but did they become the property of M? Viscount Simonds stated (p. 731): "Their Lordships were not referred to any case in which in such circumstances property so acquired has been held to belong automatically to the party defrauded. . . . The principle that the purchaser of a chattel takes it, as a general rule subject to what may turn out to be informalities of title has no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes. That there is a remedy, perhaps more than one, available to the person defrauded is obvious, but that is not to say that property so acquired belongs to him so that he can sue in conversion a third party into whose hands it has come."

M also failed to establish a conversion by the appellant bank of the cheques which he sought to make his own property by ratification of R's action. Applying the principle of *Union Bank of Australia Ltd. v. McClintock* [1922] 1 A.C. 240 (P.C.), M could not ratify in part and repudiate in part "for, if he ratifies at all, he ratifies the dealing by Ward and the appellant with the cheques, and, if he does not ratify, nothing has been converted that ever belonged to him."

T. ELLIS LEWIS.

LEASE—RENT—EVICTION OF TENANT—REQUISITION BY CROWN

By a rule that is both ancient and reasonable, a landlord who dispossesses his tenant is unable to sue for rent. But what happens if the landlord is the Crown, and the Crown then requisitions the property under statutory powers? In *Commissioners of Crown Lands v. Page* [1960] 3 W.L.R. 446 the Court of Appeal and Gorman J. were all agreed that the case fell outside the rule: the requisition did not prevent the Crown from claiming rent, and the tenant's remedy was to claim the statutory compensation under the Compensation (Defence) Act, 1939, *viz.*, "a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land . . . under a lease granted immediately before the [requisition]." Since the property was in London, it seems a fair guess that its rental value in February 1945, the

time of the requisition, may have been less than the rent reserved by the lease, which was granted in 1937. At any rate, the defendant, who was an assignee of the lease, preferred not to claim the compensation but to insist on his immunity from rent. He did in fact succeed as regards some instalments of rent which were more than six years in arrear and were barred by the Limitation Act, 1939; but as to the rest he failed. He was, however, granted leave to appeal, so more may be heard of the interesting point which he raised.

In the leading judgment the learned Master of the Rolls based himself upon a definition of eviction given in *Upton v. Townend* (1855) 17 C.B. 30: eviction means "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." He then discussed whether the requisition was for this purpose sufficiently "permanent" and showed a sufficient "intention." On the first point he finally expressed no opinion, for he was satisfied that the "intention" was not enough to amount to an eviction and to bring the common law rule into play. In his opinion the intention to be attributed to the Crown, when exercising its powers (or duties) as requisitioning authority, "cannot fairly be said to have been an intention on its part *qua* landlord of depriving the lessee of his 'enjoyment' of the premises, or to have been an intention that the lessee should not continue to 'hold the premises.' " The force of the latter point is that under its requisitioning powers the Crown acquires only a statutory right of occupation, which does not deprive the owner of the estate vested in him.

It may perhaps be asked, with great respect, whether these arguments really reach the heart of the matter. The rule that an evicting landlord cannot sue for rent is far from easy to track down to its source. But its source may be suspected to lie in the principles of tenure. Dispossession of the tenant by the landlord does not prevent the landlord from suing upon other covenants in the lease (*Morrison v. Chadwick* (1849) 7 C.B. 266) but it is an absolute bar, even if the dispossession is only partial, to any action for any part of the rent. Presumably the reason for this is that rent is a *service* of a tenurial character, to be rendered by tenant to lord in respect of the tenement. It is an "entire service," in that it issues out the land, and any eviction of the tenant by the lord exonerates the tenant from his service. As it was put in 1675 in one of Pollexfen's arguments (Poll. 141 at 142), "a man cannot have land in his possession, and a rent issuing out of the same land at the same time." But from Co.Litt. 148b it seems that

the rent is apportionable where the landlord's entry is lawful, for example, where the tenant surrenders part of the tenement. But if the landlord recovers the whole tenement, however lawfully, the whole rent must inevitably cease to be payable. This appears to dispose of the question, also discussed by the Court of Appeal, whether the landlord's eviction need be "wrongful."

The "permanence" and "intention" discussed by the Master of the Rolls, on the other hand, seem to derive from a discussion of the difference between a mere trespass (against the tenant by the landlord) and a genuine eviction. That question was not in issue in the present case, for plainly the Crown had to dispossess the tenant completely. If it is not thought unduly antiquarian to consider the nature of rent as a service, it may be that the tenant's claim to be quit of the rent could be supported on established principles.

A final question was whether the tenant could sue for disturbance of quiet enjoyment. There was no express covenant, but there was the normal implied covenant which arises from the relationship of landlord and tenant. The court held that no breach of this covenant could be imputed to the Crown because of the well-settled rule that public authorities cannot by contract fetter the powers and duties that they must exercise for the public benefit: see *William Cory & Sons Ltd. v. City of London Corporation* [1951] 1 K.B. 8. Accordingly the Crown could not be taken to covenant that it would not exercise its requisitioning powers—and even if it did so, the covenant would not be enforceable. But Devlin L.J. founded his whole judgment on this point, holding that if there was no unlawful disturbance of quiet enjoyment there could be no question of eviction. If, as already suggested, the eviction doctrine is based on tenure and not on covenant at all, it is difficult to see how it is relevant to the evicted tenant's right to withhold rent that the implied covenant for quiet enjoyment may not have been broken.

H. W. R. WADE.

LEASE—ORAL GRANT BY FREEHOLDERS TO THEMSELVES AS PARTNERS—
CONVEYANCE—TERM CERTAIN

CAN you grant yourself a lease of your own land by word of mouth? This was the first question which faced the Court of Appeal in *Rye v. Rye* [1960] 3 W.L.R. 1052. Two solicitors, Arthur and Frank Rye, practised in partnership under an agreement which gave Arthur a larger share of the profits than his brother Frank. In 1942 they moved their practice to new premises, which they had

purchased as equitable tenants in common in *equal* shares, and they agreed that they would as partners pay a rent of £500 a year to themselves as freeholders. In 1948 Frank died, and Arthur continued the practice alone, the freehold now being vested in him and the two trustees of Frank's will, one of whom was Frank's son Ralph (another solicitor). Two years later Arthur took Ralph into partnership. This partnership was dissolved in 1957, but Ralph refused to leave the premises and practised on his own account in one room. Arthur now brought this action against him for possession, claiming that a tenancy had been granted to himself and Frank in 1942, which with all the other partnership assets had vested in him as survivor, pending the winding up of that partnership and distribution of the proceeds. If Arthur was tenant, Ralph had no right to remain.

Now at common law a conveyance to oneself was impossible, though the result could be achieved by the machinery of the use. Eventually legislation authorised a conveyance to oneself and another, first of personalty (1859) and then of freehold land (1881); and the Law of Property Act, 1925, further provided that "a person may convey land to . . . himself" (s. 72 (3)) and that "two or more persons . . . may convey, . . . any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party" (s. 72 (4)).

But does the word "convey" include a grant by parol of a yearly tenancy? The definition section states that "'Conveyance' includes a mortgage, . . . lease, . . . disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; 'convey' has a corresponding meaning" (s. 205 (1) (ii)). Harman L.J. and *semble* his brethren considered that the words "by any instrument" govern not only "release and every other assurance," but also all the preceding words from "mortgage" onwards. But although this means therefore that "conveyance" is defined in terms of written transactions, the definition is not exhaustive; for in the first place the paragraph reads: "'Conveyance' includes . . ."; and in the second, each definition in the subsection is stated to apply only "unless the context otherwise requires." Thus as the Act itself permits the creation of certain leases (including a yearly tenancy) by parol (s. 54 (2)) the Court of Appeal had no doubt that such a lease must be a "conveyance." It followed that by virtue of section 72 (4) Arthur and Frank could grant themselves a yearly tenancy by word of mouth alone.

But had they actually done so? Although they had agreed that the partnership should pay £500 per annum as the rent of the

premises, it was admitted by the plaintiff that "there was no definite time agreed." Buckley J. at first instance was satisfied, however, from the fact that the partners were in possession and that some payments of £500 a year had been made, that a yearly tenancy had been created. But the Court of Appeal declined to draw this inference. The evidence, said Lord Evershed M.R., was "extremely defective," and in particular "nowhere does it appear from what date the alleged tenancy began" (p. 1057). Harman L.J. added tersely "there seems to have been no beginning agreed upon, still less an end." In the absence of a tenancy the plaintiff could not show a better right to possession than his nephew (who was also a joint freeholder) and his action for possession of the room accordingly failed.

Now it is axiomatic that "in every lease for years the terme must have a certaine beginning and a certaine end" (Co.Lit. 45b, citing Bracton). But it is strange how mildly this principle operates. Thus it is no objection that a periodic tenancy may continue indefinitely (see *Oxley v. James* (1844) 13 M. & W. 209 at p. 214 for a justification). As regards the "certain beginning," it may be that Vaughan C.J. was right when he declared that "there are many examples of leases being void for uncertainty of commencement" (*Anon.* (1674) 1 Mod. 180) but if so they are rarely to be found in the reports. Reliance can often be placed of course on the maxim *id certum est quod certum reddi potest*. Furthermore if a deed omits to state when the term is to begin, it is considered to run from delivery of the deed (Co.Lit. 46b); and when the language of agreement is used for a demise (for "the words 'agree to let' have long been held the same as words of actual letting": *Doe v. Benjamin* (1839) 9 Ad. & E. 644 at p. 651) the term so granted begins, unless otherwise stated, from the date of the agreement (*Furness v. Bond* (1888) 4 T.L.R. 457).

It would seem then that the fact that in this case there was "no beginning agreed upon, still less an end" need not have been fatal to the contention that a lease was created; for the brothers' agreement could itself have operated as the grant of a yearly tenancy, to run from the date of their agreement. But no doubt the real objection lay in the "paucity of evidence" that a lease was really intended, coupled with the "extreme artificiality" of the whole arrangement (see Lord Evershed M.R. at pp. 1057, 1055). Where in the case of a somewhat loose agreement the parties clearly intended a tenancy to arise, the law is doubtless right to refrain from insisting on technicalities, and to infer that a term was granted. But the law is justified in withholding such indulgence if in a similar agreement the object of the parties was to create not

a genuine tenancy, but merely a convenient method of adjusting their partnership accounts.

J. C. HALL.

MORTGAGE—POWER OF SALE—POSSESSION

THE case of *Braithwaite v. Winwood* [1960] 1 W.L.R. 1257 is one where a mortgagee sought the now fashionable remedy of possession. Time was when it was unusual for a mortgagee to enter into possession, but nowadays the opposite occurs when a mortgagee's power of sale has arisen, for this remedy of sale is advantageous only if vacant possession can be offered. The court was also asked to declare whether the power of sale was exercisable, and Cross J. first applied his mind to this question. The Law of Property Act, 1925, draws a distinction between the arising of the statutory power of sale and its exercise. The power arises, if the mortgage is by deed as in this case, when the mortgage money becomes due: s. 101 (1) (i). It becomes exercisable if there has been a breach on the part of the mortgagor of some provision in the mortgage deed: s. 103 (iii), and in two other cases not here material.

The subject-matter of the mortgage was a cottage, purchased by the mortgagor from the mortgagee, and mortgaged by him on the same day for £500, part of the purchase price allowed to remain on mortgage, free of interest. The mortgage money was repayable three months hence, but there was a proviso that if the mortgagor punctually observed the covenants, and the power of sale had not arisen, the money would not be called in for ten years. After about four years, the mortgagor committed a breach of covenant. He had assigned to the mortgagee an insurance policy securing payment to the mortgagor of £500 at the end of ten years. In the mortgage deed, the mortgagor covenanted to pay the premiums on this policy punctually. He defaulted because he thought the policy would no longer be required, the local authority having decided that the cottage should be demolished, and negotiations being in progress for a resale by the mortgagor to the mortgagee. These negotiations however broke down. The mortgagor then said that he wished to reinstate the policy by paying the arrears to the insurers. This required the consent of the mortgagee as assignee, which was forthcoming.

Cross J. held that on the breach of covenant by the mortgagor, the sum of £500 immediately became repayable. The power of sale therefore arose, and was forthwith exercisable. The mortgagor argued that the mortgagee was in equity estopped from pleading that the power of sale was exercisable, in that he had consented to

the payment of arrears to the insurers and reinstatement of the policy, relying on *Combe v. Combe* [1951] 2 K.B. 215, but Cross J. held that this consent was not intended to indicate, nor did it imply, that the proceedings already instituted for possession and recovery of £500, before the consent was given, were to be discontinued.

Cross J. then came to the interesting question whether he was bound to order delivery of possession forthwith, or had any discretion to give time to the mortgagor. In *Hinckley Building Society v. Freeman* [1941] Ch. 32, while yet a counsel, his Lordship had argued that a court must accede to a mortgagee's prayer for possession, and had no jurisdiction or discretion to give time, but his submission was rejected by Farwell J. From before the Judicature Acts, the jurisdiction to order possession to a mortgagee was vested in the courts of common law, and was exercised speedily and automatically, but in 1936 this jurisdiction was transferred to the Chancery Division, and equity in the person of Farwell J. indicated that this is yet another case where it will stand between the mortgagor and the rigours of the common law, even though before 1936 it never interfered with the orders of courts of common law in such matters. This view was approved by Upjohn J. in *Robertson v. Cilia* [1956] 1 W.L.R. 1502, but he refused to exercise his discretion in favour of the mortgagor, as there was no evidence that he had any means of repaying the capital sum, though interest had been paid up to date. However in *Fourmaids v. Dudley Marshall* [1957] Ch. 317, Harman J. distinguished the cases of 1941 and 1956 as dealing with mortgages of the building society type, where the lender seeks to maintain the borrower in possession, and does not want to go into possession himself. The mortgage before him was not of the building society type. Cross J. rejects this distinction, though he does seem to indicate that if the matter were *res integra* he might have followed his own argument in the *Hinckley* case: at least he says this is a view that he can well understand. While deciding that he had a discretion to give time, he declined to do so, on the ground that the mortgagor was no longer living in the cottage, and during the four months the case had been pending had made no efforts to settle the matter.

It is probably wise to leave the door, if not open to a mortgagor who seeks to retain possession, at any rate ajar, but it seems clear that to obtain such relief, available only since 1936, the mortgagor will have to make a special case, which apparently has to be based on the expectancy of being able to arrange a repayment of principal in the near future. No less an authority than Megarry has advocated a uniform rule in this field for mortgages of every kind,

though one feels that the uniformity that would have most appeal for Cross J. in the absence of authority would be a uniform rule that brooked no delay in the delivery of possession to the mortgagee beyond the usual twenty-eight days' grace.

R. N. GOODERSON.

CHARITY—CY-PRÈS DOCTRINE—EXCESSIVE ACCUMULATION

A LEARNED Canadian correspondent draws attention to an Alberta case on the application of the *cy-près* doctrine to accumulating income destined for charity but falling foul of the Accumulations Act: *Re Burns Estate* (1960) 32 W.W.R. 689. The case is the more interesting for dealing with problems which must often arise. After providing for various annuities the testator directed that the surplus income from his estate should be accumulated during the life of his daughter-in-law, and that on her death the whole estate should be divided in fixed proportions between certain legatees and certain charities. If the case was governed by the Accumulations Act, 1800 (replaced in England by section 164 of the Law of Property Act, 1925), the direction to accumulate necessarily became void after twenty-one years. The testator died in 1937 and in 1958 the question arose as to who was entitled to the surplus income during the remainder of the daughter-in-law's life.

The legatees contended that the Accumulations Act did not apply because they were absolutely entitled to their portion of the estate together with all its income from the testator's death, and could therefore (as they claimed) put an end to the accumulation at any time under the rule in *Saunders v. Vautier* (1841) Cr. & Ph. 240; 4 Beav. 115. This point was concluded against them on the English authorities by the decision of the House of Lords in *Berry v. Geen* [1938] A.C. 575. The rule in *Saunders v. Vautier* applies only where the whole of the intermediate income belongs to the ultimate legatees, so that they can truly claim to be the only persons interested in both capital and income. The direction to accumulate is then ineffective: *Wharton v. Masterman* [1895] A.C. 186. But if other persons are interested—for example annuitants entitled to a share of the income, or to recourse against it in case of deficiency—the rule will not apply. But, since there is then an effective direction to accumulate, the Accumulations Act must apply, and income which after twenty-one years can no longer be accumulated will fall into residue, or pass as on intestacy, according to the circumstances. In the Alberta case there were annuitants who had interests in the income of the accumulating fund. The learned judge of first instance accordingly upheld the claim of those entitled on intestacy, and the legatees did not appeal.

But the further question, which was taken to the Appellate Division, was what was to happen (after the twenty-one years) to the income of the other portion of the estate destined for the charities. Did this also belong to those entitled on intestacy? Or was it governed by the testator's general charitable intention as to that portion, so that the income which could not validly be accumulated ought to be devoted to charitable purposes *cy-près*? The Appellate Division held that the latter answer was correct, following the English decisions: *Martin v. Margham* (1844) 14 Sim. 230; *Re Monk* [1927] 2 Ch. 197 C.A.; and *Re Bradwell* [1952] Ch. 575. These cases hold that where a fund is directed to be accumulated and then given to charity, the charitable intent excludes the next-of-kin or other individual claimants, so that even where the accumulation partially fails under the Accumulations Act the income will still be destined for charity, and a scheme must be made *cy-près*. But, as Roxburgh J. pointed out in the last of these cases, the Act provides that when further accumulation is forbidden the income shall go to "the person or persons who would have been entitled thereto if such accumulation had not been directed." On the hypothesis commanded by the Act it would seem difficult to find a general charitable intention, and easy to uphold the claim of the next-of-kin. But the courts have surmounted this obstacle.

At first sight it is perhaps puzzling that the same reasoning was not followed in *Berry v. Geen*, already mentioned, where surplus income was to be accumulated for an excessive period for the ultimate benefit of a charity. The point does not seem to have been argued, and perhaps it did not arise for reasons not reported. One possible explanation is that general charitable intention was excluded for the very same reason that excluded the rule in *Saunders v. Vautier*: there were annuitants who had rights of recourse against the income in priority to the gift to charity, so that there was no exclusively charitable intention as to the income in question.

As a matter of interest English readers may particularly be recommended to peruse the dissenting judgment of Porter J.A. on the appeal. In his opinion the Accumulations Act did not apply at all in Alberta. In 1887 the territory was by statute made subject to the laws of England, civil and criminal, as they stood on July 15, 1870, "in so far as the same are applicable to the Territories." Was the Accumulations Act "applicable"? In a long discussion the learned judge of appeal mentioned that the principal objection to Peter Thellusson's famous will was that it tended to the accumulation of immense masses of land in the hands of a few individuals. In 1887 Alberta had a population of 16,000 to share an

area of over 160 million acres—a sufficient contrast to the tight little island of Britain. “The whole history of the country indicates that it was settled by people who came here for no other purpose than to accumulate. . . . They were without capital. . . . None of their enterprises could have survived without accumulation. . . . Nowhere in Alberta did a condition exist comparable to that which existed in England.” Although this was a minority view, it illustrates the option which is sometimes open to judges in other Commonwealth countries to decide whether to transplant English law or not.

H. W. R. WADE.

THE ADEQUACY OF THE LAW OF TORTS *

CECIL A. WRIGHT †

I

ANY attempt to evaluate the adequacy or inadequacy of tort law in general is bound to fail unless the scope of inquiry is severely limited. All attempts to find some unifying principle have failed. In light of the diverse interests involved which may be political, domestic or economic, and the purposes to be achieved, which may range from the quasi-criminal to determination of title to property, it would be a miracle of intellectual abstraction if it were otherwise.

To confine inquiry to "accidental" injuries, *i.e.*, those arising as a by-product of some lawful activity carried on for reasons other than the invasion of a plaintiff's interest, is helpful but not satisfactory. For example, "accidental" injury to a person's privacy, honour or reputation could fall in this category. While issues of "strict liability" or liability for "fault" permeate this field and have, in England and Canada, been developed by the courts in favour of the former, public interest in freedom to disseminate news and the encouragement of freedom of speech is an important factor here which makes it impossible to compare other branches of the law where there is no counterpart. Here too legislation is playing an important role. By statute in England¹ attempts have been made to mitigate some of the harsher features of strict liability by eliminating damages and substituting an "offer of amends" for accidental and non-negligent defamation. While legislation in Canada has been widespread,² particularly with regard to the total or partial abolition of the distinction between libel and slander, such legislation has nowhere changed the strict liability of the common law. The English legislation has, however, been followed in the extension of privileges of newspapers, radio and television broadcasts, to publish in good faith defamatory matter in the reporting of many news items.

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¹ The Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 66).

² See the Uniform Defamation Act, approved in 1944 by the Conference of Commissioners on Uniformity of Legislation in Canada and adopted in Alberta, R.S.A. 1955, c. 78; Manitoba, R.S.M. 1954, c. 60; New Brunswick (in part) R.S.N.B. 1952, c. 58; Prince Edward Island, R.S.P.E.I. 1951, c. 41. See also the Ontario Libel and Slander Act, 1958 (Ont.), c. 51.

An inquiry limited to physical injuries or tangible property damage "accidentally" caused may be either too broad or too narrow: too broad in the sense of abstraction in pursuit of internal symmetry at the expense of social fact; too narrow in excluding certain economic losses in situations where policy (or social fact) requires results similar to physical and property damage cases. An instance of the former is the equating of a physician's or surgeon's liability for negligence with the negligence of a manufacturer resulting in defective products. A judgment against a doctor in what we still call a "malpractice" action has such an effect on his reputation and future livelihood as to make the equation unrealistic. This difference is reflected in the practical operation of the law. For example, in some Canadian jurisdictions where juries are still the prime tribunal for "fault-finding," the courts, without legislation, have denied a jury in malpractice cases.³ Similarly, until a few years ago, Canadian courts had adamantly refused to apply the *res ipsa loquitur* doctrine against any medical man.⁴ The spread of liability insurance may be one factor tending to bring the malpractice cases more in line with other situations.

Candler v. Crane, Christmas & Co.,⁵ in which, despite the heroic efforts of Denning L.J., the English Court of Appeal refused to impose liability on accountants for economic loss sustained by a plaintiff who acted, as defendants knew and intended he would, on negligently prepared financial statements, illustrates the other difficulty referred to, of making distinctions for what appear to be insufficient factual differences. It is true that the negligence here was in a sense a "misrepresentation" (but this has been the case in other cases of physical harm where liability was imposed for "negligence") and the loss was economic and arose from acting on the statements, but is this, in itself, any reason for treating this case differently from that of a physician whose negligent advice causes physical harm? The decision, almost unanimously criticised by academic writers, illustrates the rigidity of the *stare decisis* doctrine in torts in England. Some members of the court almost seem pleased by the fact that the English law had been built up "in disconnected slabs exhibiting no organic unity of structure."

One of the most important advances in the law of torts in the last twenty-five years has been the reduction of isolated categories,

³ See *Smith v. Rae* (1919) 46 O.L.R. 518; *Hodgins v. Banting* (1906) 12 O.L.R. 117.

⁴ "The doctrine of *res ipsa loquitur* no matter how ingeniously put, has no application in malpractice cases": *Clark v. Wansborough* [1940] O.W.N. 67, 72. Compare now *Nesbitt v. Holt* [1953] S.C.R. 143; [1953] 1 D.L.R. 671, affirming [1951] O.R. 601; [1951] 4 D.L.R. 478.

⁵ [1951] 2 K.B. 164.

developed under independent rubrics with accumulation of detailed rules, under broad principles of fault. The decision in *Donoghue v. Stevenson*,⁶ by abolishing the myth of privity of contract, in broadly stating the "neighbour" rule and "foreseeability" of harm as a basis for imposing liability in fault, has had a liberalising influence on the entire field of tort law. Perhaps Canadian courts, now freed of the theoretical necessity of following English decisions, will go further in this direction than the English courts. For example, the House of Lords in 1947⁷ refused to recognise any liability for negligence in permitting animals to roam on the highway despite the fact that they undoubtedly create great risk of harm to motor traffic. Last year, the Supreme Court of Canada,⁸ in an exceptional burst of new-found independence, refused to follow this decision by recognising a "developing law of negligence." English law up to the present has refused to extend the doctrine of *Donoghue v. Stevenson* to real property.⁹ While the point has not been settled in Canada there are indications of a more realistic view being taken despite the "weight of authority."¹⁰ From time to time English courts have imposed liability on owners of land whose houses, due to disrepair, have caused damage to persons on highways under the rubric of "nuisance."¹¹ In so doing they have reached a position of strict liability. Canadian courts have tended to treat such cases as instances of negligence.¹²

Most of these instances involve internal clarification and elucidation of the "fault" principle which undoubtedly now predominates our thinking in torts. The latter illustration, however, raises an entirely different question in the sense that the English courts in the cases mentioned appear to have abandoned the "fault" principle in favour of a strict liability. Why? Is it because of any difference in objective or philosophy? And why one rule for falling trees,¹³ another for escaping animals,¹⁴ and still another for falling houses?¹⁵ There would appear to be more justification in existing social fact to distinguish a manufacturer's liability for defective products from the liability of a surgeon or accountant than in distinctions of this kind. Before we can justify a strict liability on a householder, I

⁶ [1932] A.C. 562.

⁷ *Searle v. Wallbank* [1947] A.C. 341; [1947] 1 All E.R. 12.

⁸ *Fleming v. Atkinson* [1959] S.C.R. 513; 18 D.L.R. (2d) 81.

⁹ See *Otto v. Bolton* [1936] 2 K.B. 46; [1936] 1 All E.R. 960.

¹⁰ See, e.g., *Johnson v. Summers* [1939] 2 D.L.R. 665 (Man.).

¹¹ *Wringe v. Cohen* [1940] 1 K.B. 229; [1939] 4 All E.R. 241. See also *Mint v. Good* [1951] 1 K.B. 517; [1950] 2 All E.R. 1159.

¹² See, e.g., *Cowan v. Harrington* [1938] 3 D.L.R. 271 (N.B.).

¹³ *Caminer v. Northern and London Investment Trust Ltd.* [1951] A.C. 88; [1950] 2 All E.R. 486.

¹⁴ *Searle v. Wallbank*, *supra*, note 7.

¹⁵ *Wringe v. Cohen*, *supra*, note 12.

suggest we ought to know a great deal more than we do about the prevalence of insurance or other methods of an owner's ability to distribute or absorb losses of this kind. To this we shall return. Suffice it to say that the mere word "nuisance" is not sufficient to warrant distinctions of this nature.

While judicial decision has done much to reach broad generalisations of the fault principle, the general reluctance of English courts openly to recognise their creative powers has been ameliorated by remedial legislation. Indeed, it can be argued that by steadfastly maintaining an appearance of the law's inability to surmount difficulties the English courts make legislative reform easier and more wide-sweeping. The Occupiers' Liability Act, 1957, is an illustration in point. This legislation followed close upon two or three House of Lords judgments which were remarkable for their enthusiasm in reaching results that were far from inevitable, were indeed opposed to common sense, and could only be supported by a literal interpretation of isolated words in early decisions.¹⁶ It has always struck me as rather remarkable that following on the heels of these judgments the Lord Chancellor referred to the Law Reform Committee the very problem of elucidation, improvement or simplification in the law of occupiers which the House of Lords had done so much to obscure. It is also remarkable that the Committee recommended, and the legislation embodied, an express repeal of some of these very decisions, as well as wiping out the distinction between licensee and invitee, and making the broad principle of negligence applicable to all persons lawfully on an occupier's premises.

Legislation of this kind raises many questions. Is it sounder to use a wide generalisation than to leave the creative work of reform to the courts? Will legislation of this kind wipe out all distinctions between a private owner of uninsured land and a business corporation throwing its premises open to the public, or will the courts have merely a new starting-point for further elaboration of differences? And if so, what are the significant factors that the courts will consider or, for that matter, what were the social facts considered by the Committee?

In Canada one thing is sure. It will be much more difficult to persuade nine jurisdictions to pass legislation extending liability. Powerful insurance lobbies; the fact that Canadian lawyers, like American, are closely allied to business interests as compared to the

¹⁶ See, e.g., *Jacobs v. L.C.C.* [1950] A.C. 361, recognising the necessity of "common interest" as the basis of the invitor-invitee relationship; *London Graving Dock v. Horton* [1951] A.C. 737, limiting an invitor's duty to "unknown" dangers.

barrister of England; and the virtual exclusion of the academic lawyer in Canada from matters of law reform would seem to indicate greater hope in that country in relying on judicial creativeness.

Of more importance, however, is the question whether a generalisation of this kind may not obscure important differences. Without expressing disapproval of legislation of this kind, in a sense it is a tidying-up process reached in the interest of logical symmetry in pursuit of the "fault" principle. Even assuming the validity of that principle, is there not as much reason for distinguishing the care to be expected of a person inviting a social guest to dinner and the proprietor of a large department store throwing its doors open to the public? And if there is a move to strict liability to members of the public via the nuisance route in England, should this be extended to the expected public in department stores? And if juries administer this law, will they not tend to apply a strict liability to such stores and, if so, will they not tend to do the same to the private home-owner? It may be that the English judge, sitting alone, will be able to make some of these distinctions, but only if he is willing to recognise his creative role and to use it in the realisation that, as I shall indicate later, there is a world of difference in the mere shifting of a loss from a plaintiff to a defendant, and a liability which is not shifted to the defendant *alone* but to him as a means of loss distribution. In other words, the new legislation must, to be realistic, furnish merely a new starting-place for further distinctions. Whether those distinctions are as arid as the ones that preceded them must depend ultimately on whether we really mean "moral fault" or whether, as in many cases today, we talk "fault" and come up with something else. The recent legislation in England is in a sense "lawyers' law" in lawyers' concepts. The present problems of tort are not so much matters of law or internal consistency as sociological, depending on what we hope to achieve and at whose expense.

While English legislation concerning the occupier fits into the general "fault" pattern of current legal thought, contributory negligence legislation designed to permit a negligent plaintiff to recover damages, albeit reduced, despite his contributing fault, was a marked departure from the traditional individualism characteristic of the environment in which the fault principle flourished. Here, reversing the customary order of things, Canada, with such legislation appearing in 1924,¹⁷ was some years, twenty-one to be exact, in advance of England. To allow compensation to a person in "fault" is certainly a departure from the fault notion of deterring

¹⁷ The Ontario Contributory Negligence Act, 1924 (Ont.), c. 32.

or punishing a wrongdoer and sets a new value on the desirability for compensation itself, even though the parties were equally at fault—a provision expressly spelled out in the Canadian Acts.

While apportionment statutes may, from one point of view, be deemed a refinement of the fault principle, they may also be considered as a move towards liability without fault, particularly when the respective degrees of fault cancel each other out. Strange things can happen under these Acts, depending on one's approach to them, as I shall later show. Here it is sufficient to note that the effect of these enactments has extended far beyond the objects envisaged, certainly in Canada, by their innovators. They have compelled a complete re-examination of many problems, such as the relationship between contributory negligence and *volenti non fit injuria*,¹⁸ as well as the broader problem of considering the extent of a duty of care to persons facing a known danger.¹⁹ As contributory negligence was always closely associated with talk of causation, they have inevitably led to a reduction of many of the absurdities of the last wrongdoer rule and one would have thought they would have eliminated entirely the common law expedient of avoiding the consequences of contributory negligence, namely, the last clear chance doctrine associated with *Davies v. Mann*.²⁰

While assumption of risk has for all intents and purposes disappeared in England, I regret to say that the Supreme Court of Canada, after a decision which bade fair to eliminate it,²¹ seems to have reintroduced it²² in a manner which is presently making not only confusion but considerable profit for the legal profession in the course of protracted litigation in an attempt to discover whether a passenger in a motor-car is completely barred by knowledge of his driver's intoxication.

In the last fifteen years England has done much more towards the elimination of the last clear chance doctrine than the Canadian courts have achieved in almost forty years under the contributory negligence legislation. Inasmuch as juries are in Ontario and British Columbia (the two provinces producing the bulk of negligence litigation) still the predominant tribunal for the determination of these issues, it is obvious that the confusion caused by introducing questions of last opportunity along with questions of

¹⁸ *Car & General Insce. Corp. Ltd. v. Seymour and Maloney* [1956] S.C.R. 322; 2 D.L.R. (2d) 369.

¹⁹ *A. C. Billings & Sons, Ltd. v. Riden* [1958] A.C. 240; [1957] 3 All E.R. 1; *Whitehead v. North Vancouver* [1939] 3 D.L.R. 83 (B.C.).

²⁰ (1842) 10 M. & W. 546.

²¹ *Car & General Insce. Corp. Ltd. v. Seymour and Maloney*, *supra*, note 18.

²² *Miller v. Decker* [1957] S.C.R. 624; 9 D.L.R. (2d) 1.

comparative fault, or failing to leave such questions to the jury, is a prolific source of litigation and appeals.²³

It is apparent from this incomplete story of judicial and legislative reform, often referred to as the responsiveness of the law of torts to "new social needs," that there has been a steady emphasis on the fault principle even though it includes persons on whom the principle may in action have different effects; that generalisation may obscure situations in which an approximation to moral fault is more important than in others; that in so doing we have no guide whether to extend or to limit liability. All of this tends to obscure the very "social needs" to which we are supposed to respond. One of those needs is compensation for injured persons. Must compensation be limited to injuries caused by fault, and if so, why, and when? That all liability is a curb on freedom of action is true, but when is it likely to be an undue curb and when not? Do we attempt to answer these questions or do we act on a *priori* assumptions originating in another philosophy and affecting us only by the dead hand of *stare decisis*? Answers to these questions cannot be made from within the law alone. The future of the law of torts would seem to lie in examining the premises on which we proceed and attempting to make an evaluation of them in light of social facts which at present we ignore.

II

It has been pointed out many times that with the rise of modern industry and its industrial and highway accidents, tort law dealing with compensation for accidental injuries emerged from obscurity.²⁴ It was in line with the philosophy of the time that emphasis should have been placed on the defendant's freedom of action, and that liability should accordingly have been restricted to those injuries which an individual had the opportunity of avoiding by the exercise of care. This also coincided with an historical view of the law of torts as providing remedies of a deterrent or penal nature visited on a wrongdoer.

There are, however, instances in Canadian and English law of strict liability, some the result of legislation, others of judicial origin. If the law of torts is considered as *shifting* a plaintiff's loss to him who caused it, these cases do not provide any reason for such

²³ Compare the following two judgments of the Supreme Court of Canada: *McKee v. Malenfant* [1954] S.C.R. 651; [1954] 4 D.L.R. 785; *Bruce v. McIntyre* [1955] S.C.R. 251; [1955] 1 D.L.R. 785. And see MacIntyre, "Last Clear Chance After Thirty Years Under the Apportionment Statutes" (1955) 33 Can. Bar Rev. 257.

²⁴ For an excellent survey, see Green, *Traffic Victims* (1958: Northwestern University Press).

a shift. A plaintiff's gain would be a defendant's loss with no corresponding reason, such as fault, deterrent or punishment, to justify the law's intervention. It is more than possible, however, that some of these cases originated in a realisation, more or less hazy, that a plaintiff's loss could be deemed an inevitable expense of a given enterprise and distributed by a defendant to those segments of the public benefiting from the activity. Others may have originated by mere chance but were and are capable of development along this line if the question of "loss distribution,"²⁵ or what has been called "enterprise liability,"²⁶ were given the same prominence in our thinking as "fault." It is true that both are assumptions capable of abuse without study and proof, but there seems no reason to glorify one and ignore the other; or to attempt to rationalise one in terms of the other; or to justify one principle for achieving results unattainable by the other when the facts so far as we know them are to the contrary. Nor is it sound to jeopardise a sound scheme of compensation without fault by the introduction and relentless pursuit of a fault principle. All of this has taken place and is taking place at the present time.

In a realisation that industrial injuries were the inevitable result of modern industry, and over the protests of the legal profession that to compensate employees regardless of fault on their part or of their employers would increase accidents, Canada, beginning in 1912, abolished the doctrine of fault-finding so far as industrial accidents are concerned.²⁷ Industry now bears the cost of all accidents to workmen regardless of fault. All redress to the courts has been abolished, as well as appeals from boards administering the compensation funds provided by annual contributions of employers. It is surprising to Canadians to realise that in England it is still possible to have appeals from compensation awards, and even more surprising to learn that the employee can at his option choose to pursue his common law remedy rather than the more speedy and cheap method of compensation. The positive statements that compensation regardless of fault would reduce standards and increase industrial accidents have not only been proved false, but the accident rate has steadily gone down with the development of the compensation principle.

In 1868 the House of Lords, in *Rylands v. Fletcher*,²⁸ expressly recognised the principle of strict liability. From that day on, the

²⁵ See Harper and James, *The Law of Torts* (1956: Little, Brown & Co.), Chap. 13.

²⁶ Ehrenzweig, *Negligence Without Fault* (1951).

²⁷ See now the Workmen's Compensation Act, R.S.O., 1950, c. 430. There are similar Acts in the other Provinces.

²⁸ L.R. 3 H.L. 330.

case has been a storm centre with courts and text-writers. Those whose philosophy supported the fault principle labelled it an "anachronism" or a "medieval principle." While for a time it showed considerable vitality and, as later interpreted, held promise of a general principle of "enterprise liability," there is little doubt that in the last ten years in England the doctrine has been severely limited. Indeed, in *Read v. Lyons*,²⁹ grave doubt was thrown on the application of the doctrine to physical injury and the suggestion made that it was confined to "proprietary" rights of a plaintiff. It is startling to learn that the common law places a higher value on property than on physical security, and in this connection Canadian courts have again manifested independence by refusing so to limit the principle.³⁰ On the other hand, they have not shown any great inclination to realise its full potential. For example, it could have been argued, as demonstrated in American writing,³¹ that damage caused by an airplane to property or persons on the ground should result in a strict liability on the wide basis of interpreting *Rylands* as an "excessive use" of a private right.³² In 1920 England passed legislation reaching this result directly.³³ The object is clear; individuals should not be called upon to subsidise the airplane industry by bearing the expense of inevitable accidents. Up to the present time, liability in Canada is based on proof of negligence, and in a recent case³⁴ where a mink farmer's resources were wiped out by fright caused to his mink by a low-flying airplane, the fact that the airplane operator could not reasonably have avoided the injury was fatal. Strict liability was not argued.

The largest and most important field of judicially created strict liability lies in the "vicarious liability" of a master for a servant, and now extended widely to "principal" and "agent." In holding an employer responsible for the injuries caused by his employee, the law has given up fictions of "implied authority" or "control" and has openly recognised an "enterprise liability" in which an employer must accept the normal risks of his business regardless of whom he employs to carry it on.³⁵ Inasmuch as the employee must

²⁹ [1947] A.C. 156; [1946] 2 All E.R. 471.

³⁰ See *Aldridge v. Van Patter* [1952] O.R. 595; [1952] 4 D.L.R. 93.

³¹ See, e.g., Bohlen, "Aviation under Common Law" (1934) 48 Harv.L.Rev. 216.

³² See Fletcher Moulton L.J. in *Wing v. London General Omnibus Co.* [1909] 2 K.B. 652, who spoke of cases under *Rylands v. Fletcher* as being in reality cases of nuisance which he defined as "excessive use of some private right whereby a person exposes his neighbour's property or person to danger."

³³ See now the Civil Aviation Act, 1949 (12 & 13 Geo. 6, c. 67), s. 40, re-enacting s. 9 of the Air Navigation Act, 1920.

³⁴ *Nova Mink Ltd. v. T.C.A.* [1951] 2 D.L.R. 241 (N.S.).

³⁵ Compare, for example, the modern cases dealing with extension of a hospital's liability for the conduct of professional personnel: *Gold v. Essex C. C.* [1942] 2 K.B. 293; *Cassidy v. Ministry of Health* [1951] 2 K.B. 343.

first be found at fault, these cases, by accepting a fiction for fact, are regarded without much thought as illustrating the "fault" principle. The justification for the doctrine, however, has nothing to do with "fault." Industry absorbs and distributes the loss more satisfactorily than by leaving it on an impecunious employee.

*Lister v. Romford Ice, etc.*³⁶ shows how relentless pursuit of a fault principle based on unfounded premises can frustrate this "enterprise" liability. This decision allowed an employer to recover from his employee the amount paid by the former for damage caused by the negligent driving of his truck. The action was in reality brought by the employer's insurance company pursuant to subrogation rights. To place the burden of a more or less inevitable risk of the employer's business, and one which had been effectively covered by insurance, on an individual employee without insurance is a complete reversal of the policy justifying vicarious liability. The strength, and weakness, of the fault principle is shown by statements that it would not be in the public interest that drivers be immune from the financial consequences of their negligence. This, with respect, is nonsense. If true, it should require the abolition of all insurance for "negligence." One can only hope that this judgment will not be followed in Canada.

If there be in existence *any* recognition in law of the "distribution of loss" theory, as there undoubtedly is, surely it should be openly acknowledged and studied in comparison with studies of the effect of the "fault" theory. Motor-car accident litigation presently occupies more than 60 per cent. of all Canadian courts' time. In this field negligence has its widest application, yet it is in this field that "fault," and any deterrent effect of a judgment based thereon, has least application. In Ontario, for example, 90 per cent. of motorists are insured and all plaintiffs can, in the absence of insurance, ultimately look to a state Unsatisfied Judgment Fund.³⁷ This means that negligence is "developing" in a totally unrealistic setting so far as its general principles and premises are bases or reasons for loss "shifting" as between individuals. Here, as has often been pointed out, a defendant is only a nominal party—a "conduit pipe" through whom a process of distribution starts to flow. Unless this distinction is consciously made by courts (a) we are in danger of impeding established systems of sound distribution; (b) principles of "negligence" developed in this field may well operate disastrously if applied to other situations, *e.g.*, the surgeon, the individual home-owner; (c) we shall obscure cases where moral fault and true deterrence are still sound objectives.

³⁶ [1957] A.C. 555.

³⁷ See the Highway Traffic Act, R.S.O., 1950, c. 167, Part XIV.

III

As I gather the purpose of this conference is to explore "fault," "strict liability," and statutory reforms, I propose to mention briefly several topics in the motor-vehicle field where these three elements combine. Limitations of time will not permit adequate treatment of these questions and they are intended to be illustrative of Canadian trends and, perhaps, mildly provocative.

1. In the motor accident field, throughout Canada, the increasing use of liability insurance has been directed, not merely to protecting the motorist from his common law liability but in affording protection to the victims of accidents. Thus, the Uniform Insurance Act gives an injured person a direct right of action against the insurer, and bars the insurer's defences for breach of conditions available against the insured in an action for recoupment by the injured party.³⁸ In stressing protection of the injured person rather than protecting the insured we have moved a long way from the idea of fault since, if a tort liability is to operate as a penalty or deterrent, insurance should not even be allowed the wrongdoer against the consequences of his own act. In other words, such provisions and their steady extension set the scene here, as elsewhere, for transition to liability without fault on a compensation basis. This, indeed, has been reached in the Province of Saskatchewan.³⁹

2. England, many of the Western provinces in Canada, as well as the Australian states, have, with the advent of liability insurance, abolished the jury. In the Province of Ontario alone it is quite likely there are more jury trials in negligence actions in a week than will be found in Australia or England in an entire year. Trial lawyers in Ontario almost unanimously support the retention of the jury in negligence cases.⁴⁰ Apart from rhetoric, the chief reason given for its retention is that "the jury system makes for far more settlements than any other single factor in our jurisprudence." Comment seems unnecessary.

As over 90 per cent. of automobile claims are settled, it is reasonable to infer from the uncertainty of jury awards prompting such settlements that a large number must be based on liability apart from fault. Lawyers supporting the trial jury are willing to admit that in the ordinary automobile accident the case that is actually tried by a jury is a case that never in fact took place,

³⁸ See, e.g., in Ontario, the Insurance Act, R.S.O., 1950, c. 183, s. 214.

³⁹ The Automobile Accident Insurance Act, 1946 (Sask.), c. 31. And see *A Report on the Study of Compensation for Victims of Automobile Accidents*, prepared by a Special Committee of the Saskatchewan Government (1946).

⁴⁰ See Special Lectures of the Law Society of Upper Canada, 1959, *Jury Trials*.

and is the result of conjectural recall, imagination, colourful dramatisation, and pure inventiveness.

Whether juries ignore the fault principle is, however, debatable. If general verdicts were possible, this could be the case, but with the control exercised by the Canadian judges in putting specific questions asking the jury to specify in detail the negligence which they find against the plaintiff, there is almost the same liberty on appeal to interfere with jury verdicts as with those of the trial judge. What is added is an element of confusion in the sense that juries do not understand either the charges nor the questions. This, of course, accounts for by-passing litigation and substitutes as a reasonable figure for compensation the nuisance value of the lawsuit.

3. If it is possible to obtain a jury verdict without specifying specific acts of negligence then there is undoubtedly a freer scope for the juries' inclination to award compensation and disregard the fault principle. This is shown by Canadian experience under a section which appears in all provincial Highway Traffic Acts providing that in an action between a pedestrian and a motorist the onus of disproof of negligence is placed upon the motorist.⁴¹ As motorists are not more likely to be negligent than pedestrians, this can only be a halfway measure towards a liability apart from fault. Juries are charged in such cases simply to answer the question whether the defendant had satisfied them that the plaintiff's injuries did not arise from his negligence, and it has been held improper to ask a jury to specify specific acts of negligence.⁴² One can see how easy in such cases it is for a jury to hold the insurance company they suspect is behind the motorist—although mention of insurance is still a ground for discharging the jury.⁴³ Here, palpably, we keep the form, but the substance has changed radically.

4. It is becoming increasingly difficult to obtain evidence in any motor-car accident and expansion of the principle of *res ipsa loquitur*, or of something similar, is already making a bid for recognition in English and Canadian courts. From the point of view of consistency with the fault principle, a plaintiff must lead evidence pointing to the negligence of the defendant. This is still the textbook rule in motor-car accidents. But what if the evidence is so conflicting that in the case of two motor-cars a judge cannot make up his mind whether it was the negligence of one, the other, or both? In such cases there is a tendency in English authority to use the equal fault notion permitted by comparative negligence

⁴¹ See, e.g., in Ontario, the Highway Traffic Act, R.S.O., 1950, c. 167, s. 51.

⁴² See *Ross v. Grey Coach Lines Ltd.* (1929) 64 O.L.R. 178; [1929] 3 D.L.R. 841; *Newell v. Acme Dairy Ltd.* [1939] O.R. 36; [1939] 1 D.L.R. 512; *Beach v. Healey* [1943] S.C.R. 272; [1943] 2 D.L.R. 665.

⁴³ See *Koebel v. Rive* [1958] O.R. 448.

statutes and thus hold both parties negligent.⁴⁴ There are similar indications in Canada,⁴⁵ but Canadian courts have struggled against them and in some cases held the practice to be unsound.⁴⁶ Again, uncertainty leading to settlements or extended litigation.

While *res ipsa loquitur* has, theoretically, no place in shifting the burden of disproof of negligence, in England this seems to be the effect of recent decisions.⁴⁷ This may be more or less inevitable when the same person rules on the applicability of *res ipsa loquitur* to a given set of facts and then determines its effect at the end of the trial. Without noticing this distinction, many Canadian courts have increasingly used the *res ipsa* doctrine in this way in trials with a jury.⁴⁸ As this relieves the jury from making specific findings, capable of review on appeal, we have another instance of the jury acting without regard to fault.

5. I have already referred to the principle of vicarious liability as an expanding field of strict liability. In all Canadian provinces this has been carried further in the case of the automobile by statutory provision making the owner of an automobile liable for loss or damage sustained by the operation of his motor-car unless such motor-vehicle is driven without the owner's consent.⁴⁹ The object here seems to be that of making the owner's automobile policy available to the victim of the accident. To this extent it is a clear, if not express, recognition of the loss distribution principle. While the driver of the car must still be found negligent, no one is really interested in him unless it be a claim in subrogation by the defendant owner's insurance company. I have already queried the desirability of this type of action.

6. A much more fundamental problem is one which time will not permit of developing in detail here, but which is perhaps of overwhelming importance in this whole subject; that is the extent to which damages may or may not be limited by the so-called "foreseeability" test. Granted the principle of fault, it was undoubtedly based on the view that a man should only be liable for those injuries which he had an opportunity of avoiding and he could only avoid such things as he might have foreseen as likely to happen from the course of conduct he entered upon. It is rather strange that

⁴⁴ See *Bray v. Palmer* [1953] 2 All E.R. 1449; *Baker v. Market Harborough, etc. Society* [1953] 1 W.L.R. 1472.

⁴⁵ See *Leaman v. Rea* [1954] 4 D.L.R. 423 (N.B.).

⁴⁶ See *Wotta v. Haliburton Oil Well Cementing Co. Ltd.* [1955] S.C.R. 377; [1955] 2 D.L.R. 785; *Vaughan v. Isenor* [1955] 2 D.L.R. 403 (N.S.).

⁴⁷ Particularly *Moore v. R. Fox & Sons* [1956] 1 Q.B. 596; [1956] 1 All E.R. 182.

⁴⁸ Compare *Zeppa v. Coca-Cola, Ltd.* [1955] O.R. 855; [1955] 5 D.L.R. 187.

⁴⁹ See, in Ontario, the Highway Traffic Act, R.S.O., 1950, c. 167, s. 50; in British Columbia, the Motor Vehicle Act, R.S.B.C. 1948, c. 227, s. 81 (1); in Nova Scotia, the Motor Vehicle Act, R.S.N.S. 1954, c. 184, s. 201 (3) (4).

England should have begun emphasising this limitation of liability at a time when the insurance principle in automobile accidents seems to demand its relaxation.⁵⁰ Canada, in view of the fact that it has taken pride in ignoring all American developments in law, and particularly any developments discussed by academic teachers of law, has entered into this controversy to only a limited extent. I think it is fair to say that the general prevailing climate in Canada is definitely along the lines of *Re Polemis*⁵¹ rather than the *Palsgraf* case,⁵² and is only vaguely interested in foreseeability issues. Personally, I think we have engaged too much in this rationalisation of negligence for our own good. Although the "risk" notion is undoubtedly better than thought-evading talk of "cause" with adjectives either in English or Latin, may we not continue to hope that courts will use language which expresses their real reason for decisions. For example, in a recent English case,⁵³ liability for nervous shock to a mother caused by seeing the defendant negligently back his car against her son was denied because the driver could not have foreseen the mother's injuries since he was backing slowly. Had he backed more quickly, the result would have been otherwise! Any jury to whom the negligence issue was left would undoubtedly have found in favour of the child's mother. If we are to deny liability, let us deny it openly and refuse liability for any illness caused by nervous shock resulting from grief rather than fear—if that is what we mean. Again we have little but confusion and uncertainty leading to inadequate settlements or "jackpot" litigation.

Perhaps the answer to the "foreseeability" limitation lies in the type of case to which it is being applied. Granted that in the motor-car accident field we are not dealing with individual defendants who are at "fault," but with insurance companies, courts might well abandon or curtail such attempts to limit liability. In cases where a policy of loss distribution is not so certain or where the prevalence of insurance is not guaranteed, the foreseeability limitation if diluted by a great deal of common sense might still be of considerable assistance.

7. As wide-sweeping as the previous item is the question whether, in dealing with fault, we are really close to fault at all in the normal sense in which we use that term. Apart from adopting an objective standard, recent studies in the United States indicate that the

⁵⁰ See *Bourhill v. Young* [1943] A.C. 92; [1942] 2 All E.R. 396; *Glasgow Corporation v. Muir* [1943] A.C. 449; [1943] 2 All E.R. 44; *King v. Phillips* [1953] 1 Q.B. 429; [1953] 1 All E.R. 617.

⁵¹ [1921] 3 K.B. 560.

⁵² *Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339; 162 N.E. 99.

⁵³ *King v. Phillips*, *supra*, note 50.

majority of accidents are caused by a small minority of persons who are accident-prone.⁵⁴ If these conclusions be right, our theory of liability based on freedom of choice goes out the window.⁵⁵

8. On the basis of extending liability, everyone welcomed the statutory innovations of the Contributory Negligence Acts. For reasons in this and the following section I must confess that I have lost some of my original enthusiasm. It is possible that such Acts may result in a serious curtailment of insurance company liability unless attention is paid to the realities of motor-car litigation rather than the common law formalities. Assume that A and B's cars collide, and A sustains \$10,000 damage and B \$4,000; in an action with counterclaim both drivers are found equally at fault, and we have a judgment of A v. B for \$5,000 and of B v. A for \$2,000. If, as many Canadian courts do, we set these judgments off, one against the other, as if they were truly personal actions between A and B, it would appear that \$3,000 only would be paid by B's insurance company and \$11,000 absorbed individually by the parties out of an accident in which there was available insurance sufficient to cover the total loss of \$14,000. It can and has been argued that if we had not "reformed" our law, a jury might have found at least \$10,000 in favour of A or \$4,000 in favour of B. It is true that some courts do not set off these judgments. This is an open recognition of the fact that the true parties are not A and B but the two insurance companies. In that event, of course, B's insurance company will pay A the \$5,000 and A's insurance company will pay B the \$2,000. This is a desirable practice, but in view of the lack of uniformity we have another uncertainty which, in the hands of skilful insurance counsel, leads to settlements discounted by this and other uncertainties.

9. In most Canadian provinces the question of contribution between tortfeasors has been made an integral part of the Contributory Negligence Act, and by judicial legislation all issues of negligence, contributory negligence and contribution must be decided in one action involving all possible claimants.⁵⁶ The practical result is that the combined effect of two statutory

⁵⁴ See the literature collected and discussed in Harper and James, *The Law of Torts* (1956) s. 11. 4.

⁵⁵ The effect of mental incapacity or insanity on tortious liability is still in the doubtful category. See *Morriss v. Marsden* [1952] 1 All E.R. 925 and compare *Buckley v. Smith Transport Ltd.* [1946] O.R. 798. In the latter case a defendant employer was exonerated from liability for damages caused by the "negligent" act of his servant, since the servant could not be held at fault because of his insanity. Even if the servant be free of liability, why exonerate the employer for an act which, performed in the course of defendant's business, created an unreasonable risk of harm to plaintiff?

⁵⁶ *Cohen v. McCord* [1944] O.R. 568; [1944] 4 D.L.R. 753.

“reforms” frequently results, sometimes by express statutory enactment, in a severe and unjustifiable restriction of liability.

The gratuitous passenger in a motor-car affords one illustration. Many provinces, under the influence of a powerful insurance lobby, have limited liability of the driver of a car in one way or another⁵⁷ and in one of them (Ontario)⁵⁸ his liability was completely eliminated on the ground that proceedings by gratuitous passengers were likely to be something other than the “knock-down” and “drag-out” fight that a contest to find “fault” against a “wrongdoer” should be. This in itself was bad enough: but matters are worse when a second car is involved. Assume that X is offered a gratuitous ride in A’s car. A and B collide and both are negligent in causing X’s injuries. Originally, X could have sued both A and B. After legislation eliminating A’s liability to X, the latter could still sue B and collect his entire damage. Armed with the doctrine of fault, and no doubt influenced by the question of contribution, many of the Negligence Acts in Canada have now been amended to provide (in situations where A would not be liable to X) that when X sues B it has to be found to what degree his own driver, A, was at fault and then, in effect, A’s fault is to be attributed to X and his recovery against B will be limited by the degree of fault found against his own driver, A.⁵⁹ Obviously, it was felt that to allow X to sue B and recover 100 per cent. of his damage might permit B to sue A for contribution and thus indirectly establish a liability which had been eliminated. The result is that a person in the position of X can under no circumstances recover his entire damage if it should happen that his own driver has been guilty of any negligence. To me this is not merely nonsense but unnecessary and vicious nonsense.⁶⁰

⁵⁷ Usually by requiring a “guest” passenger to prove “gross” negligence.

⁵⁸ The Highway Traffic Act, R.S.O., 1950, c. 167, s. 50 (2); New Brunswick had originally abolished all liability, see the Motor Vehicle Act, 1934 (N.B.) c. 20, s. 52 (1), but in 1955 restored liability for gross negligence. See the Motor Vehicle Act, 1955 (N.B.) c. 13, s. 242.

⁵⁹ See, e.g., in Ontario, the Negligence Act, R.S.O. 1950, c. 252, s. 2 (2). The Ontario section has been followed in other provinces adapted to the situation where the owner is only liable for gross negligence.

⁶⁰ In jurisdictions requiring “gross” negligence to be established in order to bar a guest’s recovery, the effect of such legislation would impute the “ordinary” negligence of a driver to a guest and thus cut down his recovery against a second negligent driver. If the guest’s driver were guilty of “gross” negligence, there is no imputation of his fault to the guest. In such a case the guest could conceivably recover 100 per cent. from a second negligent driver who might not, if the “host” driver were insolvent or uninsured, have any effective recourse over. To allow the possibility of full recovery against a second driver simply because one’s host driver was “grossly” negligent, and to deny it because the host is negligent but not “grossly” so is, to say the least, a strangely weird result. The liability of the second driver is minimal when the host driver is slightly negligent. It may reach its maximum when the host driver’s conduct approaches the “wilful” or “wanton.”

Other instances of the same kind could be given, *e.g.*, a wife injured by the negligence of her husband and a third person. Accepting the validity of the doctrine that a wife cannot sue her husband in tort (a doctrine impossible to justify if the defendant is no longer really her husband but an insurance company) legislation has now provided that the wife can only recover against the third person her damages reduced by the amount of damages attributable to the fault of her husband.⁶¹

By this mixture of contributory negligence and apportionment it has become possible for Canadian courts to say expressly that the Negligence Acts are a "limitation as to responsibility,"⁶² and to consider that degrees of fault are now equated with degrees of causation. This confusion of "fault" and "causality" is the creature not only of the courts but of legislation.⁶³ It differs radically from the English approach where, for example, in a husband's action for loss of his wife's consortium he is in no way affected by his wife's contributory negligence.⁶⁴ In Canada the wife's negligence is usually imputed to the husband on the apparent principle that the defendant should not pay for more than that "part" of the damage "caused" by his own negligence.⁶⁵

IV

It was in light of such Canadian experience that Saskatchewan in 1946 introduced its Automobile Accident Insurance Act⁶⁶ in which a minimum of compensation was secured for persons injured by motor-cars on the highway, without proof of fault. I do not advocate the adoption of a comparable scheme, although I am convinced that some method of compensating victims of motor-car accidents must be evolved freed from the uncertainty and confusion of the fault principle. At the present time the judicial and legal climate is strongly opposed. Professional self interest is here cloaked not only by the customary "fault" and demonstrably erroneous "accident prevention" talk that characterised opposition to workmen's compensation but in the existing political climate, by reference to "socialism" and encroachment on "free enterprise." In light of the fact that the profession is supported by powerful insurance pressure groups it

⁶¹ See the Ontario Negligence Act, *op. cit.*, s. 2 (3).

⁶² See *Young and Young v. Otto* [1948] 1 D.L.R. 285 (Alta.).

⁶³ See the statutory illustrations cited above and see MacIntyre, "The Rationale of Imputed Negligence" (1944) 5 U. of Tor. L.J. 368.

⁶⁴ *Mallett v. Dunn* [1949] 2 K.B. 180.

⁶⁵ See the Ontario cases, taking this view, considered and discussed, but not followed, in *Macdonald v. McNeil* [1953] 1 D.L.R. 755 (N.S.). The Nova Scotia court followed *Mallett v. Dunn*, *supra*, note 64.

⁶⁶ See *supra*, note 39.

may be some time before legislatures will move directly to a compensation scheme.

In the meantime, my only suggestion is that our law teaching should stress and, I would hope, that our courts would recognise the occasions when they are operating within a field where loss distribution rather than loss shifting is an existing social fact, and that in the former they should, even under the fault principle, go far to extending the bounds of liability, whereas in those fields where they are uncertain the principle of risk limiting liability may be given full play. This will require more serious studies than have yet appeared in Canada investigating the social facts on which the principles of liability operate. At the present time, we have no studies made of how our law of torts is operating, and until our law schools produce such studies we will have no method by which to evaluate the existing law and very little from which we can proceed to advocate reform.

CAUSATION IN THE LAW

GLANVILLE WILLIAMS

HART and Honoré's book ¹ is a thorough and scholarly study of the concept of causation in Anglo-American law. Closely reasoned, with full reference to the literature and a considerable treatment of Continental theories, it represents a serious attempt to restate the law in tort, contract and crime in an intelligible way. In future, any serious student of the subject will have to take note of it. Unfortunately for the authors they have backed a loser in supporting *Re Polemis* ² and criticising the foreseeability test; and since much of their argument depends upon their opinion on this question, their book must now be accounted largely out of date, if the decision of the Judicial Committee in *The Wagon Mound* ³ receives the acceptance that seems probable. In respect of the general theory of causation, however, the discussion retains its intellectual interest; and the chapters on contract and crime, though relatively short, are largely unaffected by *The Wagon Mound*.

The usual analysis is that causation for the lawyer's purposes is a compound of factual causation and what must, for want of a better expression, be called legal (or proximate) causation.⁴ The present article will offer some observations on these matters, with special reference to the tort of negligence, in the light of the authors' discussion.

FACTUAL CAUSATION

The first part of Hart and Honoré's work is devoted to a most interesting discussion of causation in the non-legal sense—though the discussion is written with an eye to the needs of the lawyer. What name to give to this non-legal causation is a problem. Various expressions may be used: factual causation, causation in fact, actual causation, scientific causation, philosophic causation, the necessary or sufficient conditions of an effect, causation *sine qua non*. These different names are to some extent connected with differences of definition, or differences in the concept.

¹ *Causation in the Law*. By H. L. A. Hart and A. M. Honoré. Oxford: Clarendon Press: Oxford University Press. 1959.

² [1921] 3 K.B. 560 (C.A.).

³ [1961] 2 W.L.R. 126, noted above, p. 23. The official name of the case is *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*

⁴ Cf. Hart and Honoré, 104.

Three chief types of definition may be distinguished.

(1) Factual causation is to be defined in such a way as to link it with scientific uniformity and the possibility of demonstrative repetition.

(2) Factual causation is a popular, common-sense notion, to be investigated partly by examining the ordinary use of language.

(3) Factual causation is any event but for which the result would not have happened.

Writers in this field would perform a service if they attached different adjectives to the word "cause" when used in these various meanings. All of them are possible in different contexts. The first may, perhaps, be called scientific causation, the second popular causation, and the third causation *sine qua non*. The last expression is capable of misleading, since the traditional distinction is between the *causa sine qua non*, in the sense of the background conditions, and the *causa causans*, the dramatic cause which holds our interest; in another sense, and the one presently intended, the *causa causans* is itself one of the *causae sine quibus non*. In order to avoid this ambiguity between the traditional and the literal meanings of the Latin expression it will be best to use English. "But for which . . . not" causation is too clumsy, and I will follow the Americans in calling it "but-for causation."

Factual causation is important in assessing legal responsibility because it does something to limit the field of legally relevant events. The court does not, of course, have to compile an exhaustive list of the causes of an item of damage in respect of which the litigation arises. The question is a specific one: was the act or omission of the defendant (or of one for whom he is responsible) a cause of the damage? If it is held to be a factual cause, then the further question arises whether it is legal cause. The legal cause is the legally significant factual cause. What is legally significant may vary from one branch of the law to another. Causation in crime may be governed by different principles from tort, and the construction of an excepted peril in a charterparty or policy of insurance may be different from both.

But-for causation

If so much be agreed, we may put legal causation aside for the moment and inquire what is the best definition of factual causation for the purposes of the lawyer. The majority view among legal writers, with which I concur, favours the third definition, but-for causation.⁵ The factual cause means the whole set of conditions

⁵ See, e.g., Beale in 33 H.L.R. 638.

preceding the result and necessary to produce it, in the sense that the absence of one of them would have given a different result. Alternatively, we may use the expression "a cause" to mean any one of this set of conditions. We should not, however, speak of "the" cause in relation to a single member of the complex, since this would carry the false suggestion that other conditions are excluded from factual causation.

The definition, already very wide, becomes even wider when it is realised that we are concerned not only with what happens but with what does not happen. Hart and Honoré rightly recognise that there can be negative causes, such as a lack of oxygen causing death.⁶ In legal problems, the negative cause is a culpable omission on the part of the defendant.

The chief objection to defining factual causation in but-for terms is that it becomes Adam-and-Eve causation. What is the use of defining "cause" so widely that it goes back to the primeval slime? The answer is that the notion of but-for causation enables us to eliminate irrelevant events. This causation is of no importance when it is present, because it merely shifts the inquiry on to legal causation; but it is of great importance when it is absent, because it concludes the case without an investigation of legal causation. Let us consider two hypothetical cases.

A chemist sells a box of tablets to X for use as a photographic developer. The tablets are poisonous, and X knows this; but the chemist negligently omits to state on the box what the tablets are, and that they are poisonous—he sends them out in a perfectly plain box, and this of course is negligent. X keeps them in his house, and his wife takes one of them by mistake for pills of her own. The wife dies. There can hardly be any doubt that the chemist is liable for the wife's death. (Perhaps X would be liable as well, if it were not for the relationship of husband and wife; but that is a matter with which we are not concerned.)

What caused the wife's death? The physician might answer that it was taking the poisonous tablet. But from the legal point of view there is another element, of greater relevance, namely the conduct of the chemist. The mere fact that the chemist sold poison was not negligent. His negligence consisted in a combination of factors: the positive act of selling the poison, and the omission to label it. Both these elements were the factual cause of the wife's death from the legal point of view.

The importance of this may be seen by taking another case where the factual link between the negligent omission and the

⁶ *Op. cit.* 15, 28.

death disappears. Suppose that, when X took the tablets home, he had put them away, out of the reach of a child, but his child of three had by some unusual mischance got hold of them and eaten them. The child could not read, and no notice on the box would have made any difference. In this case, the death cannot be laid at the chemist's door, because his negligence has had no operative effect. The child has been killed by the tablets, just as the wife was killed by the tablets, but in the case of the child there is no but-for causation between the antecedents that are relevant for legal responsibility and the death.

It must be emphasised that what is lacking here is not the legal proximity of causation but causation itself. We do not get as far as the problem of legal cause, because factual causation is lacking. Factual causation is a question of evidence, not of judicial precedent or legal value-judgment. It is either a simple common-sense inference from the evidence, such as the inference that a child that cannot read would not be influenced by a poison notice, or a matter for expert witnesses, as on the question whether poison caused death.

Hart and Honoré say, at the forefront of their work, that "it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned."⁷ This may be partly true of the legal notion of proximity, but it is not true of the lawyer's use of the notion of but-for causation. What would the plain man have said was the cause of the poisoning of the wife in the first example? He would undoubtedly say that the cause was the fact that the wife ate one of the tablets. If you asked him whether the child in the second example was poisoned as a result of the same cause, he would reply, with a measure of correctness, in the affirmative. This is an inadequate answer for legal purposes. The point is that an inquiry into factual causation must be made with an object in view, because *all* the causal antecedents of an event (especially if non-happenings are included as causes) are too numerous to be catalogued or investigated or thought about. Unless, in the case put, you can interest the plain man in legal problems, he will not direct his attention to the lack of a label on the box as a cause of the wife's death.

The issue of factual causation is confused by Clarence Morris, in his article "On the Teaching of Legal Cause,"⁸ from which I have taken the illustration of the child and the poisonous tablets. Professor Morris commences by distinguishing between the "actual" and the "legal" cause, and one supposes at first that

⁷ *Op. cit.* 1.

⁸ (1939) 39 Col.L.Rev. 1087 at 1096-1097.

this is the familiar distinction between but-for cause and legal proximity. However, it soon appears that Professor Morris uses the expression "actual cause" in a highly peculiar sense. An actual cause, we are told, is to be distinguished from a coincidence. The author appears to define an actual cause to involve the idea of uniformity, as in the example, which he gives, that an aspirin causes a headache to abate. A temporal sequence not involving this simple type of uniformity is, for him, a coincidence, whether it involves but-for causation or not. Hence, in the case of the child taking the pills, he says that the relationship between the chemist's negligence and the child's death is coincidental.⁹ In itself this might be acceptable language, but Professor Morris uses the same language for a case of but-for causation. He instances an American case¹⁰ where P consulted his broker D about selling his shares in the X Company; the broker told P a lie as to the current quotation of the shares, and so induced P to hold on to them. Some time later an officer of the X Company embezzled the assets of the company, and the shares dropped steeply in value. It was held that D was liable for the loss. Clearly there was a relationship of but-for causation between his lie and P's loss: P would not have lost his money if it had not been for the fraud. Yet Professor Morris calls the relationship a coincidence, and appears to see no relevant difference between this case and that of the child eating the poison.¹¹

It is true, of course, that no generalisation connects the broker's lie and the decline in value of the shares caused by the officer's embezzlement. In relation to each other they can be called coincidences; but they concur to cause the client's loss. There is no utility to the lawyer in a concept of coincidence which includes both cases where there is causation in the but-for sense and cases where there is none.

Scientific laws

We may now return to the first of the three meanings of factual causation given before: the reference to scientific laws.

For the scientist, the notion of causation involves the idea that the same effect can be repeated by reproducing the cause. In other words, the scientist is concerned with causal generalisations. But in historical and legal statements this notion of generalisation and reproducibility hardly figures at all. This, I think, is where

⁹ At pp. 1096-1097.

¹⁰ *Fottler v. Mosley* (1904) 185 Mass. 563; 70 N.E. 1040.

¹¹ *Op. cit.* p. 1097. The passage is cautiously worded; it admits some unspecified distinction between the two cases, but not in terms of causal connection.

Professor Morris goes wrong. Hart and Honoré arrive at the right conclusion, but somewhat gropingly. They begin by assuming, with Mill, that cause means regular sequence. It is only in the latter half of the book, when they are dealing with legal problems, that they tacitly drop this assumption, because it does not really fit.

Pascal said that if Cleopatra's nose had been shorter, the whole face of the earth would have been changed. This is a speculation that cannot be proved, because we cannot put the clock back to 69 B.C., give Cleopatra a shorter nose, and see whether Antony would still have fallen for her so disastrously. Nevertheless, the statement that Cleopatra's Egyptian or Grecian beauty was the cause of Antony's downfall seems to us to be probably true, because we know that men often are infatuated by female beauty. Some generalisations are implicit in statements of historical causation, but they are jejune and commonplace, and there is certainly no idea that we can reconstruct the historical events without the alleged cause in order to prove that the course of history would have been different if the alleged cause had been absent.¹²

Had this characteristic of historical causal statements been recognised early in their book, it may be suggested that some of the problems discussed by the authors would have admitted of simpler solution. Thus Hart and Honoré discuss, as an example of what they call "interpersonal transactions," the situation in which A uses threats to make B do something, and B accordingly does it.¹³ The authors say that A may be regarded as having caused B's act, and yet that he has not caused it in the same sense as that in which we speak of causal relationships between physical events. "[B's] assertion that he acted because of the threats carries no implication that, given similar circumstances, he would act again¹⁴ in this way or that, in similar circumstances, he or other persons had always acted in that way."¹⁵ Although the sentence is true, it seems to be no objection to the view that physical events and interpersonal transactions are subject to the same theory of causation.

¹² Attempts to isolate a crucial historical cause are sometimes constructed on a comparison between somewhat similar societies, where differences of development seem to be due to particular determinants. This is the method of Toynbee's *A Study of History*. See the comments in Huntington Cairns, *The Theory of Legal Science* (Chapel Hill 1941) 66-67.

¹³ *Op. cit.* p. 21.

¹⁴ *i.e.*, on a later occasion. Cf. p. 53: "This does not mean that we are committed to any assertion that, if the circumstances were repeated, the same action would follow." The authors are not addressing their minds to the question whether B would have acted on *that* occasion if there had been no threats, which is the question that I take to be the one relevant to an inquiry into factual causation for legal purposes.

¹⁵ *Op. cit.* p. 52.

Whether, in the case supposed, B will act again in the same way depends in part upon his experience resulting from the first occasion when he gave way before A's threats. The causal sequence leading to B's action may not be certainly reproducible, but that is equally true of various historical statements relating to physical events, *e.g.* I threw six successive sixes on a dice. Reproducibility is perhaps part of the idea of general causal laws, but it is not necessarily involved in historical statements.¹⁶

In the case supposed, the question whether B's conduct was caused by A's threats depends on the answer to the question whether B would have acted as he did if A had not uttered the threats. If the answer is "No," then A's threat caused the conduct. This is precisely the same notion of causation as is involved in relationships between physical events. It is admittedly a difficult question to answer in a satisfactory way. As the authors say, we attach considerable importance to B's own declarations about his reasons for acting. This is because we suppose that (assuming B is telling the truth) his conscious reasons are his real reasons. At the same time, we have to consider the possibility of self-deception, and the working of the subconscious mind. If B had some motive of his own for complying with A's threats, we may wonder whether the threats were merely used by B to whitewash his conduct in his own mind after the event. Perhaps psychiatric evidence may be available to emphasise the strength of B's own temptations towards the conduct in question. Admittedly, these investigations would rarely be made; usually we should take B's word for his motivations if we considered him an honest witness; but as a matter of analysis B's honest statement of motive is not the beginning and end of a causal investigation.

There is one respect in which the foregoing observations need to be elaborated. It is possible that B acted *both* for reasons of his own *and* because he was afraid that if he did not comply with A's threats, A would do him harm. In other words, it is possible that B's conduct is the outcome of cumulative causation, since the

¹⁶ The authors concede this point at other places in their work, *e.g.*, p. 9. At p. 66 they say that "we often trace a causal connection between an antecedent and a consequent which themselves very rarely go together: we do this when the case can be broken down into intermediate stages, which themselves exemplify different generalisations." And again at p. 29: "It is perfectly legitimate to say that A's blow caused B's nose to bleed and to feel confidence in the truth of this statement, though we could not formulate or would have very little confidence in a generalisation purporting to specify conditions under which blows are invariably followed by bleeding from the nose." The reason obviously is that, in making the *particular* causal statements with which law and history are concerned, we pick out one or a few of the causal antecedents of the effect and consider it as "the" cause. For the purpose of our treatment, we do not have to consider how many other causal antecedents there are, because we are not interested in them.

result would have been the same if either A's threats had stood alone or B's personal motivation had stood alone. In such a case it seems reasonable to treat the cumulative causes as individually operative, so that A's responsibility remains. The case is analogous to that where C dies as a result of being stabbed by A and B, each stab being sufficient to kill him; and the authors in fact discuss these two types of situation in close conjunction.¹⁷

The popular meaning of causation

It seems to be the fashion nowadays to search for philosophical verities in the popular meanings of words; and Hart and Honoré seek the answers to many of their problems by investigating the ordinary meaning of causation. A chapter is devoted to this subject of "causation and common sense," in the hope of elucidating the principles involved in the ordinary use of the word.

At first sight it may seem as if the adoption of a popular theory of causation makes it unnecessary to discriminate between factual and legal causation. The plain man, when confronted with a causal problem, does not distinguish between the question of factual causation and that of responsibility; he gives a single answer, yes or no, which is intended to resolve both questions. At the same time, it seems to me to be demonstrable that this approach is insufficient for the lawyer.

D administers a poison to P, and P is subsequently found dead. However, the medical evidence is clear that P died of heart disease and not of the poison. It needs no argument to show that D is not responsible for the death. Yet if the poison had factually caused the death, D's act would undoubtedly be the responsible cause. When D is acquitted of murdering P, he owes his acquittal solely to the medical evidence. Clearly, the question of factual causation in the but-for sense is logically prior to the selection between but-for causes which is involved in assessing responsibility.

Examples of absence of factual causation in the law of tort

The test of factual in the sense of but-for causation—would the result have followed anyway?—is not an easy one to apply, because it involves speculation. Thus where a wife injured in an accident caused by the negligence of the defendants argued that her consequent disfigurement made her husband leave her, and claimed damages on that account, the judge found as a fact that the spouses had been getting on badly together before the accident, and he thought that, although the husband had left his wife, he merely

¹⁷ *Op. cit.* pp. 116–120.

made the disfigurement an excuse; consequently, no damages were awarded under this head.¹⁸ There can be no certainty about a finding that the husband would have deserted his wife if history had been different; but certainty is not required in legal proceedings. In such a case, the plaintiff must fail unless the causal connection can be established on the balance of probability.

In some cases a court is rather easily inclined to infer causal connection. A pilot or driver who fails to keep a proper look-out is liable in negligence if his failure causes damage; but he is not liable if the damage would have been caused even if he had kept a proper look-out.¹⁹ In practice, proof of a driver's failure to keep a look-out at the time of an accident would almost always be taken to mean that the failure conduced to the accident, notwithstanding the theoretical burden of proving causal connection which rests on the plaintiff. Similarly, an employer who is in breach of his duty to supply a safety device is not allowed to defend himself by saying that the device would have been cast aside by the employees: the general principle is that he must provide it and encourage its use.²⁰ However, there are exceptional circumstances when even an employer can get off on the issue of causation. In *Qualcast (Wolverhampton) Ltd. v. Haynes*,²¹ a workman whose task was to handle ladles containing molten metal did not wear the protective spats that were available to him, and as a result he suffered injury when he was splashed on the legs. Lord Denning said:

"Even if it had been the duty of the employers to urge this workman to wear spats, I do not think their omission should be taken to be one of the causes of the accident. . . . This workman, after he had recovered from the injury, went back to work and did the same as before. He never wore spats. If the warning given by the accident made no difference, we may safely infer that no advice beforehand would have had any effect."²²

In some situations a conclusion of non-liability can be supported either by applying the theory of but-for causation or by using the foreseeability test (the risk principle), as it has now been upheld in

¹⁸ *Lampert v. Eastern National Omnibus Co.* [1954] 1 W.L.R. 1047.

¹⁹ *Nova Mink Ltd. v. Trans Canada Airlines Ltd.* [1951] 2 D.L.R. 241.

²⁰ *Richards v. Highway Ironfounders (West Bromwich) Ltd.* [1955] 1 W.L.R. at 1060 (C.A.).

²¹ [1959] A.C. at 762.
²² Mr. Cyril Grunfeld, commenting on this case in 22 M.L.R. 431, wrote: "Whatever the justification for this finding of fact in the instant case, the dangers of defining the causal nexus in the realm of pure hypothesis and speculation need not be emphasised." Perhaps this means that, in Mr. Grunfeld's view, *post hoc* should be taken to be *propter hoc* unless there is evidence to justify the inference that causal connection is absent. In one sense, hypothesis and speculation are essential for determining causal connection, since every statement of causal connection asserts what would have happened if the facts had been different.

The Wagon Mound. For example, suppose that D is conveying a box on a dray. He knows that the box contains explosives, yet does not secure it in any way. The dray is proceeding slowly, and if the box had contained harmless substances it could quite properly have been conveyed in this way; but in view of its highly dangerous character the court finds as a fact that this method of conveying it is negligent. There is a collision owing to the negligence of a third party. The box is dislodged and falls upon P's foot—but the explosives do not detonate. P's injury obviously cannot be ascribed to D's negligence, for D's only negligence was in relation to a possible explosion which did not eventuate. The conclusion is clear in terms of the risk principle, but it can also be put on the theory of factual causation. If we subtract the explosive quality of the contents of the box, the injury would still have occurred; therefore, the explosive contents of the box, and the negligence in relation to those contents, were not causally connected with the injury.

The necessity for finding factual causation appears to have been overlooked by the Court of Appeal in *Thurogood v. Van den Berghs & Jurgens Ltd.*,²³ which Dr. Goodhart rightly damned as "the case of the imaginary necktie." It was there held that employers were liable both for breach of statutory duty and at common law for allowing an unguarded fan to be set in motion on the floor of a factory for the purpose of testing. The decision on the point of breach of statutory duty seems to have been impliedly overruled by the later case of *Richard Thomas & Baldwins Ltd. v. Cummings*.²⁴ The decision on the point of common law duty is so remarkable that it is difficult to imagine it finding favour with another court. The opinion was that it was negligent to allow the fan to be tested on the floor, because the men had to stoop over it, and it was reasonably foreseeable that a necktie or some part of their clothing might get caught in the fan. There appears to have been no evidence that the men were wearing neckties, and there appears to have been no evidence whether they were wearing loose or skin-tight clothing. Suppose, for the sake of argument, that the employers had issued the men with tights and had forbidden neckties. This would dispose of the argument that the clothing might have got caught in the fan, and, since it would defeat the claim based on negligence, it would mean that the employers could not be held liable at common law for the unexplained accident to the mechanic's fingers. Let it now be assumed that the employers did not do this, but allowed the men to wear loose clothing. If the

²³ [1951] 2 K.B. 537 (C.A.).

²⁴ [1955] A.C. 321. This turned on s. 16 of the Factories Act, 1937, which was inexplicably not considered in *Thurogood's* case.

clothing caught in the fan, this would be a negligent system of work. But in *Thurogood's* case the clothing did not get caught in the fan; and so, even if the men's clothing was loose, the employers' negligence in that respect had no causal connection with the accident. The employers' negligence in relation to the loose clothing was as irrelevant as the negligence of the chemist, in a previous example, in not putting a poison notice on pills consumed by the baby. Thus the decision in *Thurogood's* case not only contradicts the risk principle, but defies the basic requirement of a causal connection between the negligence and the damage.

Facts must not be invented

There is one respect in which the test of factual causation needs further elucidation, namely where there is an alternative potential cause. Suppose that D and E independently entrust loaded guns to a boy of eight. Such conduct is negligent. The boy, having both guns in his possession, uses D's gun to shoot P. D is liable to P, since his negligent act was a factual cause (and also a legal cause) of the injury. D cannot defend himself by saying that, even if he had not lent the gun, the boy would have shot P with E's gun.

The application of the test question to this situation seems at first to give the wrong result. The question: "Would P have been shot if D had not lent the gun to the boy?" may be answered in the affirmative, on the ground that P would still have been shot with E's gun. This answer may seem to indicate lack of causal nexus. One way of avoiding this obviously untrue conclusion would be to formulate the consequence in greater detail. The question could become: "Would P have been shot at this time and in this way—i.e., with this particular bullet, emanating from this particular weapon—if D had not lent the gun?" The answer "No" means that the loan of the gun is the cause of the injury, as common sense affirms.

But a more satisfactory way of explaining how the right conclusion is to be reached is to say that the imaginary subtraction of the alleged causal fact must not be accompanied by the invention of any other imaginary facts in its place, however likely it may be that such a replacement would have occurred in reality. Bearing in mind this principle, we can revert to our original formulation of the question, "Would P have been shot if D had not lent the gun to the boy?" Since we are allowed only to subtract the fact of loan, and not to add an imaginary use by the boy of E's gun, which did not in fact occur, the answer must be "No."²⁵

²⁵ It seems to me that this is the answer to the difficulty considered by Hart and Honoré at p. 18.

Statutory tests of competence

This analysis of the but-for cause may be further illustrated by *The Empire Jamaica*.²⁶ A vessel was sent to sea with a certificated master and mate, and two other mates who were not certificated; this was a breach of a Hongkong ordinance which required a vessel of that size to have both the first and second mates certificated. One of the uncertificated mates was perfectly competent and experienced, but the ship was involved in a collision through his negligence. The question arose whether the damage occurred without the "actual fault or privity" of the owners, so that they were entitled to limit their liability under the Merchant Shipping Act. It was proved that if a proper application had been made to the authorities for exemption from the requirement of the ordinance, either the exemption would have been granted or the ship-owners would have been told that the application was unnecessary. In other words, the Marine Department in Hongkong did not enforce the ordinance according to its letter. The House of Lords held that although the shipowners were technically in breach of the ordinance, the breach was not causally connected with the damage, since the shipowners could easily have obtained exemption and the collision would still have occurred.

Applying our test question to the situation, we ask "Would the accident have occurred if the exemption had been obtained?" Subtracting the fact that the exemption was not obtained seems to be equivalent to adding the imaginary fact that the exemption was obtained. If that is the correct mental operation, it becomes obvious that the lack of the exemption was not causally connected with the accident. Since the question under investigation relates to a negative fact, our imaginary subtraction of the negative fact involves us in an imaginary addition of a corresponding positive fact; to this extent, we have to depart from our self-imposed rule of not adding imaginary facts in testing the question of causation.

The facts of *The Empire Jamaica* presented a fairly clear case, since there was uncontradicted evidence that the Marine Department regarded the breach with indifference and would have co-operated in any proposal to legalise it. To take a more difficult situation, let us suppose (1) that injury is caused by a person driving an automobile without a driving licence though without provable negligence as a matter of common law, and (2) it is held that an action lies for such breach of statutory duty if the causal connection is established. (Whether lack of a driving licence grounds an action for breach of statutory duty has not been

²⁶ [1957] A.C. 386. See Hart and Honoré, 111-114.

decided, but for the sake of the present argument the answer is assumed to be in the affirmative.) If the decision in *The Empire Jamaica* is applied, the conclusion from these premises may seem to be that there is no causal connection between the lack of licence and the injury, since even if the driver had a licence the injury would have resulted. It is evident that, on this view, the theoretical breach of statutory duty by driving without a licence can never extend the driver's liability beyond the ambit of the common law action of negligence.

The trouble with this argument is that it ignores the statutory system whereby driving examiners are made part of the machinery of public safety, and it supersedes their judgment by that of the courts. According to the statute, the driving examiner has the function of deciding in the first place whether a particular person is competent to drive. The effect of applying the rule in *The Empire Jamaica* would be to allow the judgment of this examiner to be superseded by the judgment of the jury. Admittedly, the question is not necessarily the same in the driving test as in the legal action. The examiner decides whether the driver can drive competently when he applies for his licence; the jury decide whether he was driving carefully at the time of the accident. But a negative answer to the question whether the defendant *can* drive competently may be very relevant to the question whether on the particular occasion he did drive carefully. Are the jury to be allowed to say that the defendant drove carefully although a driving examiner would have pronounced him unable to control the car properly?

It is submitted that the answer is that the decision in *The Empire Jamaica* depends upon its narrow facts, and ought not to be extended to the facts now under consideration. In *The Empire Jamaica*, the evidence was that the lack of the Marine Department's document of exemption was a mere matter of form. This might happen, too, in a motor-vehicle case, if the uncontradicted evidence were that the unlicensed driver was so competent that he could certainly obtain a licence. (This might be shown, for example, by evidence that he had held a licence in the past which had merely expired, or by evidence that he passed the test the day after the accident.) If, however, this vital issue is left unresolved, the action for breach of statutory duty should succeed, notwithstanding that the plaintiff cannot point to any conduct on the part of the driver at the time of the accident that can be called negligence at common law. For the injury is within the risk contemplated by the legislature when it instituted driving tests, and the circumstances are such that it is at least possible that the absence of a driving licence was causally connected with the injury, in the

sense that if the driver had applied for a driving test he would not have passed it, so that there was no way in which he could keep within the law except by refraining from driving.

The difficulty is to square this conclusion with the authorities to the effect that the burden of proof of causation is upon the plaintiff, even in actions for breach of statutory duty. These authorities relate to the neglect of safety provisions like the fencing of dangerous machinery,²⁷ and in that connection they supply an intelligible test. The question: "Would the accident have happened if the machinery had been fenced as required by statute?" can be answered independently of the question: "Would the accident have happened if the defendant had not been negligent?" But where the issue turns on the absence of a statutory licence, which is obtained only after some statutory examination or test has been passed, evidence of absence of the licence should be regarded as *prima facie* evidence of incompetence to drive which is causally connected with such damage as it was the object of the statute to prevent.²⁸ For otherwise the court will find itself superseding some of the functions entrusted to the statutory examiner.

Cumulative causation

Suppose that C 1 is an event (or complex of events) that causes an effect E. C 2 is another event bringing about the same effect. On a certain occasion both C 1 and C 2 occur, and E follows. Is C 1 now a cause of E? Either one has to say it is not, in which case it seems to follow that C 2 cannot be a cause either, and so E is uncaused (an unthinkable hypothesis), or one has to say it is, in which case we apparently have to modify our definition of but-for causation. That the definition must be modified can be shown by a specific example. D 1 and D 2 independently go to search for a gas leak with naked lights, and their lights ignite the gas simultaneously. Obviously both D 1 and D 2 are responsible for causing the resulting explosion, because the only alternative would be to hold that neither did so. Yet D 1's light was not a but-for cause of the explosion, since the explosion would have occurred even if D 1 had not acted.

Situations of this type present a problem of legal policy, and there is more in it than the purely philosophic aspect which Hart and Honoré discuss.²⁹ When the lawyer uses the concept of causation, he is not bound to use it in the same way as a philosopher, or

²⁷ The cases are collected in 23 M.L.R. 234-235.

²⁸ Cf. James and Perry in 60 Yale L.J. at 772-773.

²⁹ See *op. cit.* 116 *et seq.*, 225 *et seq.* At the former place the expression "additional causes" is used; at the latter place, "alternative causes."

a scientist, or an ordinary man. The concept can be moulded by considerations of policy,³⁰ and this is the case here. When, as in the illustration just given, the cumulative causes C 1 and C 2 are both wrongful, we regard them as independent causes. *However, when only one of them is wrongful, we do not regard this one as a cause, and we attribute the whole causal effect to the one that is not wrongful.* This may sound a strange and dark saying, but an example will make it clear.

P is a singer who has a standing contract with D, a cab-owner, to drive him to the theatre. In the contract, D warrants that he will convey P to the theatre in time for the performance. On one occasion D fails to arrive in time, but P has fallen ill and could not have performed in any case. P can recover nominal damages from D for breach of contract, but not (it is submitted³¹) damages for the loss of earnings, because he could not have earned his fee even if D had arrived. In this example, P's ability to earn his fee depends upon a number of factors among which are (1) the due arrival of D's cab and (2) P's continuance in health. If either factor fails, P cannot earn the money. When both factors fail, the loss of the fee is not attributed to D's breach of duty alone, and so D is not liable for this head of damage.

Suppose that P, instead of falling ill, had been locked up by his rival E, whose object was to prevent his appearance in the theatre. Here we are back to a situation where the loss is the result of two wrongful causes, both of which must be regarded as operative. E is obviously liable to P for the loss of P's fee, and cannot defend himself by pointing to the fact that the cab did not arrive. For, if we allow E to raise this defence, we must also allow D to raise the defence that P was imprisoned and so was not available to be carried. The result would be that P would fail to recover from either. Since this result would be unjust and impolitic, it follows that both D and E should be liable.

The conclusion is that whether D, the cab-owner, is liable to P for the loss of the fee depends upon whether the evil that befell P was the result of a civil wrong by another person or not. If it was, D is liable, if it was not, D is not liable. It may seem strange that D's liability should depend upon this extraneous factor, but the conclusion appears to be unavoidable.

That this conclusion coincides with the view of Hart and Honoré appears from their discussion of an American case³² where

³⁰ As McLaughlin pointed out: 39 H.L.R. 153.

³¹ Contrary to the opinion of James and Perry in 60 Yale L.J. at 775; but the latter opinion is a minority one among American jurists.

³² *Douglas, Burt & Buchanan Co. v. Texas & Pacific Ry. Co.* (1922) 150 La. 1083, 91 So. 503; Hart and Honoré 227.

the defendants unlawfully maintained a bridge which obstructed a waterway and delayed the plaintiff's barge. A lawfully-maintained bridge farther along the waterway would in any case have obstructed the barge, so causing the same delay. It was held that the defendants were not responsible for loss attributed to the delay; but Hart and Honoré rightly point out that if the second bridge had also been unlawfully maintained, the defendants would have been liable.

Some perplexing problems arise where factors that are potentially cumulative causes operate in sequence. Suppose that D 1 stabs and kills P while P is asleep, and shortly afterwards D 2 administers a similar stab to P's body, not knowing that P is dead. D 1 has killed P, but it is not immediately obvious whether D 1 is liable to P's estate for causing a loss of P's expectation of happiness during a normal life, or whether the damages for loss of expectation of happiness should be nominal because P would have been stabbed by D 2 in any case. Let it be assumed for the sake of argument, after the manner of Euclid, that the second rule is accepted. In that case, justice requires that the damages for loss of expectation of happiness that are thus saved to D 1 should be debited to D 2. But there is no principle by which D 2, who has only stabbed a corpse, can be made liable in damages for loss of expectation of happiness by the deceased. The deceased had already lost his worldly happiness before D 2's act. Consequently, justice demands that D 1 should pay in full, and that his act should be regarded as causing P's loss of expectation of happiness during a normal life.

The foregoing argument depends upon the fact that D 2's act was wrongful. Suppose that the second potentially cumulative cause is not wrongful. D 1 stabs P, and shortly afterwards the building in which P's body lies is blown up by accident, without culpability on the part of anyone, and it is found as a fact that if P. had not been killed by D 1 he would have died in the explosion. In this case, justice seems to demand that D 1 should not have to pay damages for P's loss of expectation of happiness, because P did not, as events turned out, have such expectation.³³

That one can look at impending events for the purpose of assessing damages is shown by a remarkable American case, stated by Hart and Honoré as follows.

“ In *Dillon v. Twin State Gas & Electric Co.*³⁴ the deceased

³³ Cf. *Hall v. Wilson* [1939] 4 All E.R. 85, where a breadwinner was killed before the commencement of the war; damages under the Fatal Accidents Act on account of his death were awarded in an action brought after the war had started, but the damages were reduced on account of the increased risk of death consequent upon the war.

³⁴ (1932) 85 N.H. 449, 163 Atl. 111; see Hart and Honoré, 162 n. 6, 222.

was, on one hypothesis, negligently electrocuted by defendants as he was falling to death or certain injury. This, it was held, would not negative causal connection between the negligence and the death, though it would lead to a reduction or extinction of damages on the footing that deceased's life and earning capacity had little or no value when he was electrocuted."

In this case, the deceased's fall was occasioned by his own fault. Suppose that it had been occasioned by the negligence of a third person, X. X would clearly be liable for the death if he were sued—he has negligently caused the deceased to be precipitated to certain death or injury, and it can be no defence to show that the death actually occurs not by contact with the ground but by contact with power cables in falling. The electricity undertakers would still not be liable in substantial damages for the deceased's expectation of happiness, for he had little or none in fact, and there is no reason for imposing this liability on the electricity undertakers.

Similar principles may be applied where the wrong is in respect of property. Suppose that D wrongfully takes P's spoons. It should go in reduction of damages to show that, if D had not taken the spoons, they would shortly afterwards have been destroyed in a disastrous fire that broke out without anybody's fault, because this evidence diminishes P's expectation of enjoyment of his spoons. But it should not go in reduction of damages to show that, if D had not taken the spoons, they would shortly afterwards have been stolen by X, another intruder. X cannot be made liable for the loss of spoons that he has not taken, and consequently D cannot be allowed to set up X's activities in reduction of damages.

The rule to be deduced from these situations seems to be this. Factors reducing the expectation of enjoyment can be taken into account in assessing damages, unless the defendant's tort has saved a third party from liability that he would otherwise have incurred. The rationale of the exception is that, if the third party is saved from liability by the prior act of the defendant, the defendant must be liable to the extent that the third party is so saved. Whether the third party is or is not "judgment-proof" does not affect the issue. An interesting illustration of the limits of the exception is mentioned incidentally by Hart and Honoré when treating of the duty to safeguard property. D negligently leaves the door of P's house unlocked; a thief enters and steals P's spoons, but it is clear that the thief would have broken in anyway. The authors' submission is that D is liable, though to this is added the suggestion that the assessment of the value of the spoons to P may be reduced on account of the fact that, quite apart from D's negligence, P was

pretty well doomed to lose them a few moments later than he did.³⁵ In this particular instance, the thief is liable for the value of the spoons; consequently, there is no objection in point of justice to equating the unlawful activity of the thief with a natural disaster which has the effect of reducing the value of the spoons to P.

LEGAL CAUSATION

The masters of the common law of the last two generations, including Pollock, Holmes, Salmond and Winfield, accepted the test of reasonable foresight as determinative of the issue of legal causation in negligence. This is, too, the test favoured by the great weight of legal authority during the last hundred years. It has been elaborated, especially in the United States, into a particular form known as "the risk principle," which offers a strong intellectual attraction. Yet those who favour the foreseeability test do not go unchallenged. Hart and Honoré reject it *in toto*.³⁶ Dean Prosser, foremost exponent of the law of tort on the other side of the Atlantic, has decided to live uncomfortably in his own no-man's-land between the two camps. In England, Mr. Douglas Payne started to write for one side and then changed his flag. Lord Wright, too, exhibited a considerable shift of opinion during his lifetime, but in the opposite direction. Dr. Goodhart stands firm for foreseeability, and has supported it in a number of powerful essays.³⁷ In Canada, Dean Cecil Wright appears to take the same view,³⁸ and so does Professor J. G. Fleming in Australia.³⁹ It seems likely that, within the Commonwealth, the issue will now be regarded as settled in favour of foreseeability by the decision in *The Wagon Mound*, mentioned at the outset of this article; but it is worth considering the contrary arguments adduced by Hart and Honoré.

In place of the foreseeability test, the authors propose a number of principles or expedients, including acceptance of popular "common-sense" notions of causation, a doctrine of "coincidence," and what appears to be a mechanistic philosophy of events breaking the causal nexus.

To commence with the first of these, the authors suggest that the lawyer's attitude towards problems of legal causation often mirrors principles characterising ordinary non-legal thought. This may well be true. On the other hand, it is worth observing that

³⁵ *Op. cit.* 120.

³⁶ *Op. cit.* 230 *et seq.*

³⁷ The most recent is in 76 L.Q.R. 567.

³⁸ 21 Can.B.Rev. 65.

³⁹ *The Law of Torts*, Chap. 9; 31 Can.B.Rev. 496-497.

when judges assert that legal causation is not to be taken in a "scientific," "philosophical," "metaphysical" or "logical" meaning, but rather as an expression of common sense or the understanding of the ordinary business man, this is almost always in cases concerning the construction of contracts. One of the leading authorities on this topic, *Yorkshire Dale S.S. Co. v. Minister of War Transport*,⁴⁰ turned on the construction of a charterparty which cast the "risks of war" on the charterer but other marine risks on the owner, the facts of the case raising a difficult problem of choice between these expressions. Lord Macmillan said that "each case must be judged in the light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to the commonplace tests which the ordinary business man conversant with such matters would adopt."⁴¹ It is in this context, too, that judges make such remarks as that "no formula can be devised which will provide a universal touchstone for the infinite variety of circumstances which may arise."⁴² Such opinions may be right for the construction of excepted perils in contracts, but it does not by any means follow that they apply to the question of remoteness of damages in tort. Lord Wright, on at least one occasion, recognised that the law of tort might be governed by its own special rules,⁴³ and it seems to me that a survey of the authorities shows that this is so.

Hart and Honoré approve *Re Polemis*,⁴⁴ and fit it into a theory of "coincidence." They allow that an extraordinary event occurring after the tortious act and concurring with it to produce the damage may be accounted a "coincidence," so that there is no legal causation; and they instance a case where D knocks P down, and then, quite fortuitously, while P is lying on the ground, a tree falls on him and kills him. But, the authors add, this notion of coincidence must not be extended to abnormal *conditions* existing at the time of the wrongful act; these, however unexpected and unforeseeable, do not operate to make damage too remote.⁴⁵ The particular example they give is a case of the "thin skull" type, where a small injury has serious bodily effects.

Although the authors do not describe their mental processes in

⁴⁰ [1942] A.C. 691.

⁴¹ At p. 702. Cf. *per* Viscount Simon L.C. at p. 698, and *per* Lord Wright at p. 706. See also *Boiler Inspection and Insurance Co. of Canada v. Sherwin Williams Co. of Canada* [1951] A.C. 319 at 333 (P.C.).

⁴² *Per* Lord Macmillan in the *Yorks. Dale* case, at p. 702.

⁴³ *Smith Hogg & Co. v. Black Sea Insurance Co.* [1940] A.C. at 1003. See, however, *Woods v. Duncan* [1946] A.C. at 421.

⁴⁴ [1921] 3 K.B. 560 (C.A.).

⁴⁵ *Op. cit.* 72-75 and *passim*. The discussion appears to owe something to the view of James and Perry in 60 Yale L.J. at 790-794.

detail, one can see how they have arrived at their general position. They start with a bias, which we all share, against imposing liability for fortuitous damage. However, they approve the "thin skull" rule, which, at least if narrowly stated, is not intrinsically unreasonable. Entering upon controversial ground, they decide that the foreseeability test is unworkable, and they therefore embrace *Re Polemis* as a renunciation of the test. The problem is how then to preserve anything of the proposition that abnormal consequences are not covered. At this point, the authors perceive a similarity between the "thin skull" rule and *Polemis*; both relate to freak conditions existing at the time of the tort. And so they leap to the conclusion, as others have done before them, that the tortfeasor is responsible for all existing conditions, but not for abnormal future events.

One can agree with some of the authors' particular examples without agreeing with their generalisation. The case of the tree falling upon the victim of the tort is an example of the principle of ordinary hazard or exhaustion of danger. A defendant is not liable merely because his negligence has brought his victim into a temporal and spatial position where he encounters an ordinary hazard of life, the negligence not imposing a handicap upon him in meeting the hazard.⁴⁶ The "thin skull" type of case is more difficult, but it can either be regarded as a rule on its own or settled by the general foreseeability test.

The Wagon Mound has put an end, one hopes, to the *Polemis* polemic⁴⁷; but even before that decision, when *Polemis* was still an authority, it might have been possible to interpret the latter decision restrictively, holding that it merely extended the "thin skull" rule to property. The ship full of petrol vapour was closely analogous to a human being with a fatty heart, and it is not unintelligible that an act of negligence in respect of a minor harm should make the offender liable for the total destruction of the victim. However, it would have been unfortunate to extend the "thin skull" rule to property, where, as in *Re Polemis*, the sequence of events takes such an unforeseeable turn that the defendant's negligence seems to be substantially irrelevant to the result.⁴⁸ Even if the extension were admitted, it would have to be confined to the "internal" sensitivity of the property affected, and not extended

⁴⁶ *The City of Lincoln* (1889) 15 P.D. 15, as explained in *The Singleton Abbey* [1927] A.C. 16 at 27; *Carlslogie S.S. Co. Ltd. v. Royal Norwegian Government* [1952] A.C. 292; 12 M.L.R. 375.

⁴⁷ But see further discussion of *The Wagon Mound* at pp. 23-33 of this issue [Ed.]
⁴⁸ *i.e.*, where the "risk principle" is infringed.

to sensitivity resulting from external conditions. An illustration will show the importance of this point, as well as the difficulty of drawing the distinction.

Suppose that a thief goes to steal a car which is parked by the roadside. Unknown to him, a high-pressure gas main under the road is defective. Just after the thief starts the engine, gas leaks into a sewer and starts pouring up through a drain. The spark of the ignition causes an explosion which damages the car and also sets fire to the car-owner's house. As I understand their argument, Hart and Honoré would say that the thief is not liable for this damage, because he was not at fault in respect of the explosion. The escape of the gas is a "coincidence," which has no bearing on fault. But they also say that a coincidence arising before the wrongful act does not prevent liability from arising. This seems to mean that if the gas had started to erupt before the thief started the engine, he would be liable for the explosion. It seems obvious the distinction does not accord with common sense.

This example has been constructed from the facts of a news item of 1960, though in the actual incident no theft was involved. Other illustrations may be imagined, even more bizarre. X, wishing to murder P in the best detective-novel style, arranges the wiring in P's house in such a way that when the door-bell is pressed a high voltage current will be passed to his bath. D, a mischievous boy, rings the door-bell and runs away, just as P is taking a bath, and P is electrocuted. Hart and Honoré have arranged their propositions of law in such a way that D's trespass to the bell-push inevitably makes him liable for the death. Abnormal circumstances excuse, but only when they arise after the tort.

These examples concern intentional torts, though in neither case is the wrong intentional as to the disaster that happens. If it be conceded that there is no liability in the situations suggested, it follows *a fortiori* that there can be no liability where the tort is only one of negligence.

It was mentioned before that *Re Polemis* might perhaps have been justified on the ground that the circumstance of inflammability was internal to the ship and not external to it; but this is not a very satisfactory distinction. In the case of the thief and the gas leak, the gas has penetrated into the engine of the car, and to this extent it is an internal condition of inflammability; but, all the same, common sense would reject the view that the thief is liable for the entirely untoward occurrence. Although, in constructing the hypothetical case, I have called the wrongdoer a thief, he might be a milder form of wrongdoer such as a youth "stealing a ride." A system of law that makes him liable for an altogether

freak accident would not, I think, command the general assent, even of the man in the street with his common-sense ideas of causation.

The third contribution made by Hart and Honoré to the theory of causation in negligence is in respect of the doctrine of *novus actus interveniens*. They furbish it up and modernise it; but it still remains for them, as it was for Lord Sumner, a mechanical test of causation divorced from the concept of foreseeability.

An example will illustrate the contrast between these two approaches, mechanical causation and foreseeability. Hart and Honoré declare that whereas the free, deliberate and informed act of an adult generally negatives causal connection, "the acts of young children are often unreflective or misinformed and it is familiar that such acts do not normally negative causal connection."⁴⁹ No effort is made to bring this proposition into relation with the risk principle or test of foreseeability, and the authors are at pains to deny the utility of such a test. Consider, then, the following problems.

(1) D owns a pistol. He is a bachelor, living alone, and leaves the pistol with some cartridges on his table. X, a small boy, enters and takes the pistol to play with. He fires it and accidentally injures his companion P.

It is clear that D is not liable, because he has not been negligent. He had no reason to expect that anyone would enter his house to take the pistol. Since there is no initial tort, no question of remoteness of damage or *novus actus* arises.

(2) E lives next door. He also has a pistol, and he is the father of a mischievous small boy. He leaves the pistol and cartridges on his table, his son gets them, and there is again an accident. E is guilty of negligence, since he should have foreseen that his son might get the pistol and do damage with it. The son's act does not make the damage too remote. Hart and Honoré, I suppose, would say that the reason is that the boy is so young that his act is unreflective and misinformed. But the right reason surely is that the act of the boy cannot make the damage too remote, because it is the very thing that E should have provided against. There are, in reality, not two questions: was E negligent, and did the boy's intervention make the damage too remote? There is only one question: was E negligent in respect of this damage? Once you have decided that E was negligent in failing to foresee and guard against his son's mischievous act, you have settled the whole matter. For it would be self-stultifying to decide

⁴⁹ *Op. cit.* 144.

that E was negligent in this respect and yet that the intervention of the son made the damage too remote.

The superiority of the one-question approach over the two-question approach appears most clearly if we take a combined situation.

(3) E, the father, leaves out the pistol as before, but, instead of the pistol being taken by his son, it is taken by X, the small boy in our first case, who unlawfully enters the house. X is not a friend of E's son, and E had no more reason to foresee X's entry than D had in case (1). The risk principle asks: was E negligent in respect of this particular risk? And the answer is No, because in respect of this risk E is in exactly the same position as D was in the first case. The two-question approach, however, seems to reach a different result. (i) Was E negligent "in the abstract"? Yes, because he should have foreseen that his own son might take the gun. (ii) Was the act of X a *novus actus interveniens*? No, because X is a child and is to be taken to have acted unreflectively, or without the mental capacity to have full knowledge of the danger. Therefore E is liable. It seems to me that this answer is demonstrably wrong. Hart and Honoré could perhaps avoid it by pointing out that they have only said that the acts of persons under disability do not *normally* negative causal connection. They might invoke their principle of "abnormality" to distinguish the present case.⁵⁰ But why is the act of X "abnormal" in this situation, while the act of E's son was "normal" in case (2)? Is it not because the intervention was foreseeable in (2) but not in (3)? And if so, why not relate this question to the determination of the initial issue of negligence? Why take two questions to reach a result that can more surely be reached in one?

It must be said, in fairness, that although Hart and Honoré oppose the foreseeability test, in their practical approach they are much nearer to the foreseeability school of thought than Lord Sumner was. Lord Sumner held that any *novus actus interveniens*, intentional or negligent, broke the chain of causation, whether the *actus* was foreseeable or not.⁵¹ Hart and Honoré, while trying to avoid using the concept of foreseeability, demolish almost the whole of the doctrine of *novus actus*. They rightly refuse to concede that a *novus actus* necessarily makes damage too remote if the intervening actor was constrained or hampered in any way, or if he acted through mere negligence; and their list of constraining factors is so long that little is left of the *novus actus* doctrine. Even

⁵⁰ *Op. cit.* 151 *et seq.*

⁵¹ See his speeches in *Weld-Blundell v. Stephens* [1920] A.C. 956 and *S.S. Singleton Abbey v. S.S. Paludina* [1927] A.C. 16.

where the *novus actus* was the intervention of a free and conscious volition, the authors agree, in accordance with the modern authorities,⁵² that it does not make the damage too remote if the defendant was under a duty of care to guard against the intervention. On the other hand, "abnormal" interventions excuse the defendant. This comes perilously close to reducing the whole thing to a test of foreseeability, and it is only by careful use of language that the authors succeed in preserving their nominal position.

Since the decision in *The Wagon Mound*, it seems clear that the old law of *novus actus* has to be rewritten in terms of the foreseeability test. The opinion of the Privy Council rightly points out that a test of normality or probability is, in the last analysis, merely a way of expressing the test of foreseeability which is at the root of negligence.⁵³

To uphold the principle of *The Wagon Mound* is not to assert that it solves all difficulties. One cannot, in freak situations, reach a result satisfactory to every man's sense of justice. To impose a rule means drawing a line; and any kind of line involves sundering situations that are but finely divided on the facts. But the root difficulty is that the law has to compromise between opposing principles, each equally persuasive in itself. On the one hand, there is the idea that a person who has been found to be at fault should be made to pay for the damage he has inflicted on innocent persons; on the other hand, it seems illogical and may be wholly absurd to extend liability in negligence beyond the fault that is supposed to be its basis. When the law is torn between these irreconcilable points of view, a decisive consideration is the requirement of having some rule to guide decision. Merely to leave every case to the subjective reaction of the judge would result in chaos. If the risk principle and the test of reasonable foresight are rejected, no workable way of delimiting legal causation offers itself in their place. The law student would be left with the cold comfort of Professor Clarence Morris's suggestion, that he should "memorise a reasonable number of the more popular formulae so that he can make a noise like a lawyer."⁵⁴ Moreover, the risk principle is intellectually satisfying because it prevents the law from having a purely arbitrary operation.

⁵² e.g., *Northwestern Utilities v. London Guarantee and Accident Co.* [1936] A.C. 108 at 125 (P.C.); *Wells v. Metropolitan Water Board* [1937] 4 All E.R. 639; *Stansbie v. Troman* [1948] 2 K.B. 48 (C.A.); *Davis v. Liverpool Corpn.* [1949] 2 All E.R. 175 (C.A.); cf. 52 H.L.R. 387; 65 L.Q.R. 137.

⁵³ [1961] 2 W.L.R. at 139.

⁵⁴ 39 Col.L.Rev. 1108.

NEW DEVELOPMENTS IN MISTAKE OF IDENTITY

J. C. HALL

It was only six years ago that C. J. Slade wrote his memorable article "The Myth of Mistake in the English Law of Contract"¹ in which he placed the whole subject of mistake in a new and agreeable perspective. "Mistake as such," he declared, "has no operative effect whatever at law."²

This was good news for the student; but problems of *error in persona* still had to be solved, and for these Mr. Slade proposed a simple application of the basic principles of offer and acceptance. The test was whether A's offer was addressed to B and B's acceptance addressed to A, their intention being construed objectively unless that of the one was known to the other, in which case the actual intention of the former determined the matter. The authorities, for the most part,³ ranged themselves in substantial support, and rationality, it seemed, had been injected at last into this confused branch of the law.

This reassurance has now been disturbed by the case of *Ingram v. Little*,⁴ which reminds us that the offer and acceptance test is no magic formula acting as a ready panacea for all the ills caused by *error in persona*.

The facts which gave rise to *Ingram v. Little* are by now well known. Three ladies who wished to sell their car were offered an acceptable price by a stranger, but they made it plain they would not accept payment by cheque. He then pretended to them that he was a certain P. G. M. Hutchinson and quoted an address which the ladies found to be the one shown beside that person's name in the telephone directory. Mistakenly satisfied, then, that they were dealing with this P. G. M. Hutchinson (and believing that he was a man of substance) the ladies agreed to sell their car in return for a cheque, and handed over possession. By the time the fraud was discovered the defendant had bought the car in good faith.⁵ The ladies sued him for conversion, arguing that their

¹ 70 L.Q.R. 385.

² p. 407.

³ *Sowler v. Potter* [1940] K.B. 271 was an obvious exception, but this decision had been heavily criticised by Professor Goodhart (57 L.Q.R. 228) and disapproved by Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671 at p. 691.

⁴ [1961] 1 Q.B. 31, noted [1960] C.L.J. 145.

⁵ So it was found by the judge. Sellers L.J. commented however that "the defendant . . . might have been more astute and more careful" (p. 47).

contract with the rogue was void and that consequently no property in the car had ever passed.

The judgment of Slade J. at first instance was for the plaintiffs, and although it was not reported, references to it by the Court of Appeal⁶ make it clear that Slade J. founded himself on Professor Goodhart's article "Mistake as to Identity in the Law of Contract"⁷ and asked the question there suggested, namely "how ought the promisee to have interpreted the promise?" He treated the ladies as having made an offer to sell, but an offer which was intended (and known to be intended) only for the real P. G. M. Hutchinson. Thus it could have been accepted by him alone, and not by the rogue; and no contract resulted. Slade J. also quoted Pothier's well-known principle⁸ and stated that an application of this would equally have led him to a decision for the plaintiffs.⁹

In the Court of Appeal, Sellers L.J. adopted the same approach and readily agreed with the conclusion reached. Pearce L.J. was more hesitant in deciding to whom the ladies' offer was made, but was unwilling to disturb the trial judge's finding on the point. The decision that there was no contract and that the defendant was liable in conversion accordingly stood. Devlin L.J. dissented, however, taking the view that there was offer and acceptance in form, with no mistake sufficiently serious to vitiate the ensuing contract.

It is proposed to consider in turn five aspects of the judgments delivered by the Court of Appeal.

1. KNOWLEDGE OF THE PERSON NAMED

English law has never decided whether I must know the person with whom (rather than the rogue) I claim that I meant to contract.

One may consider first the position where the rogue assumes the identity of a person who does not exist at all. Suppose that A has already refused to deal with B. B then telephones A and makes the same proposal but disguises his voice and says he is Lord C. A is impressed and enters into an (apparent) contract with the speaker. There is no such Lord. Is the contract void? On the authority of *King's Norton Metal Co Ltd. v. Edridge etc. Ltd.*¹⁰ it is not, for there is no other entity with whom A intended

⁶ At pp. 51, 53.

⁷ 57 L.Q.R. 228.

⁸ *Traité des Obligations*, s. 19, p. 13; first cited in England in *Smith v. Wheatcroft* (1878) 9 Ch.D. 223. For some interesting observations on Pothier's theory see Smith and Thomas, 20 M.L.R. 38.

⁹ See p. 54.

¹⁰ (1897) 14 T.L.R. 98.

to contract.¹¹ B and the "Lord" are one person and the fact that B has simply used an alias will not prevent a contract from arising.¹² Admittedly *Sowler v. Potter*¹³ could be cited in support of a contrary conclusion but that decision seems unsound; it has been heavily criticised by Professor Goodhart¹⁴ and disapproved by Denning L.J.¹⁵

So the person named, C, must actually exist. But must he have been known to A if A seeks to deny the existence of a contract? Of course if both B and C were unknown to A it is likely that the question of identity was immaterial, in which case a contract will arise.¹⁶ But if A has previously refused to contract with B and now thinks (as intended by B) that he is dealing with C who is a real person but wholly unknown to A, B's identity is not a matter of indifference to A. Can it be said that A's intention was to contract solely with C? The answer of Sellers L.J. was guarded: "personal knowledge of the person fraudulently represented [C] cannot, I think, be an essential feature."¹⁷

Thus it will be of no consequence that A has never met C and would not recognise him if he did. It will suffice if A has some knowledge of C's existence, even though he does not know C personally. That was the position in *Ingram v. Little*, because the ladies had conducted a piece of research before entering into their apparent contract and satisfied themselves that a P. G. M. Hutchinson lived at the address the rogue had mentioned.

One would not seek to question this. But Sellers L.J. may have been prepared to go further. He envisaged circumstances where confidence could arise in a person named by a rogue because of the occupation of that person—such as "a Minister of the Crown or a stockbroker."¹⁸ Suppose then that after I have refused to deal with you (a stranger) you state you are X, a stockbroker of a

¹¹ It may be noticed however that in the *King's Norton Metal Co.* case the plaintiffs had dealt with Wallis before and his cheque had been honoured on that occasion. See *Pollock on Contract*, 13th ed., p. 388, n. 10b.

¹² The contract will of course be voidable for the misrepresentation.

¹³ [1940] K.B. 271.

¹⁴ 57 L.Q.R. 228 at p. 243. The decision was defended by Mr. J. F. Wilson (17 M.L.R. 515) who argued that the question is whether A intended to make this contract with B, not whether he intended to make another contract with C. But Mr. J. Unger in his reply (18 M.L.R. 259) shows that this is not the question English law asks, nor the question it ought to ask.

¹⁵ *Solle v. Butcher* [1950] 1 K.B. 671 at p. 691: "I do not think that *Sowler v. Potter* can stand with *King's Norton Metal Co. v. Edridge & Co.*"

¹⁶ See *per* Sellers L.J. at p. 50.

¹⁷ p. 50. The question does not previously seem to have arisen but it has been discussed by Dr. Glanville Williams ((1945) 23 *Canadian Bar Review* 271). He shows that if the requirement is merely that C should exist the results can be very arbitrary. It would be strange if the *King's Norton* case would have been decided differently if a firm named Hallam & Co. had happened to exist, though quite unknown to the plaintiff.

¹⁸ p. 50.

certain address. I am impressed by this and make an offer, although I have no independent knowledge of the existence of this person. If in fact there is a man who is a stockbroker and who lives at that address, can I claim that my offer was made to him alone?

Sellers L.J. did not explore this position, but admitted that "there is an area of fact" where the circumstances might justify a finding either way.¹⁹ It is suggested however that the answer to the problem posed should be negative. Your adoption of an alias will not render the contract void if the name is that of a fictitious person; nor should it if the name is that of a person quite unknown to me. As a matter of policy the law should tend to diminish rather than expand the circumstances in which apparent contracts can be held to be void, and thus reduce the peril to which innocent third parties are exposed.

2. THE LESSON FROM NEW ZEALAND

Although it was referred to in each judgment, the recent New Zealand case of *Fawcett v. Star Car Sales Ltd.*²⁰ was not found helpful by the Court of Appeal in *Ingram v. Little*. The situation there was very different, but the case is nevertheless of some interest and significance. The position was, essentially, that B, standing before A with a motor car which she [B] wished to sell to A, pretended (1) that she was C, whose name was on the certificate of registration, and (2) that she owned the car. In fact C was no longer owner of the car, having sold it to someone who had authorised B to sell it. So representation (2) was, in effect, correct. Although therefore A thought he was dealing with C but in fact was dealing with B, the New Zealand Court of Appeal held (by a majority) that A's contract with B was not void.²¹ As North J. pointed out "all he [A] was interested in was to ensure that he was dealing with the true owner, and indeed he was."²³ A contract was therefore formed between them.

This decision (if one may say so) seems good sense; but it surely reveals a weakness in the orthodox approach to mistake of identity. Here A thought (and was known by B to think) that he was addressing his offer to C, another real person of whose existence A had independent evidence from the certificate of registration. But because of A's further mistake in thinking that C owned the

¹⁹ pp. 50-51.

²⁰ [1960] N.Z.L.R. 406 (C.A.).

²¹ Gresson P. dissented, though one of his grounds for doing so was that B was not the duly authorised agent of the owner.

²³ At p. 426.

car one is driven to say that A's offer was after all really intended for B, and so B could accept it. This is rather tortuous.

Now in *Ingram v. Little* the rogue pretended (1) that he was P. G. M. Hutchinson and (2) that he was affluent; and Slade J. and the majority of the Court of Appeal was satisfied that the offer made by the ladies was to P. G. M. Hutchinson alone. Now it was not true that the rogue was P. G. M. Hutchinson; neither was it true that he (the rogue) was affluent—at least the bank account on which his cheque was drawn contained only £10. But suppose that on the very Saturday when he negotiated with the ladies the rogue had won a football pool and that a gigantic cheque had arrived early the next week and been paid by him into the account, shortly before the ladies presented their cheque. The cheque would have been met, everyone would have been content and no litigation would have ensued. But the position would remain that (on the majority view) no contract of sale would have taken place and no property passed; and thus the ladies could still have recovered their car from any subsequent holder until their rights were eventually statute-barred.²⁴

This position seems absurd.²⁵ One is tempted to suggest that if they took no action at once the ladies would be taken to have affirmed the contract. But whereas one may affirm a *voidable* contract it is extremely difficult to see how one can affirm a contract that is void. As Gresson P. observed in *Fawcett v. Star Car Sales Ltd.* “a void contract is a paradox; in truth there is no contract at all”; and later “I do not think it is competent for a party to a void contract . . . to make it otherwise by subsequently electing to adopt it.”²⁶

The more satisfactory solution would be to hold that a contract arose despite the mistake of identity (as in the New Zealand case). But the intention of the ladies at the time of the negotiations would have been no different; if they had gone into the witness box immediately afterwards they would have vehemently affirmed that their intention was to deal solely with P. G. M. Hutchinson. So the majority could hardly have reached any different conclusion without doing violence to the principle they adopted.

²⁴ If however they knowingly stood by while their car was sold and made no claim they might lose their title by estoppel (Sale of Goods Act, 1893, s. 21).

²⁵ It should be remembered however that if they recovered the car the person required to return it would have an action for return of the price against his vendor and he against his vendor, the ladies eventually having to repay the “rogue” if he himself had repaid his purchaser. (See Sale of Goods Act, 1893, s. 12 (1).)

²⁶ p. 412. Dr. Glanville Williams however cites the case of *Mackie v. European Assurance Society* (1869) 21 L.T. 102 as authority for the proposition that a void contract is not necessarily a nullity (23 C.B.R. at p. 397).

It is unlikely of course that a situation of this nature would arise, or that if it did it would ever trouble the courts. But the possibility serves to demonstrate one of the dangers of attempting to discover as a question of fact, in a case of error *inter praesentes*, with whom the innocent party intended, at the time, to make his contract.

3. PRACTICAL DIFFICULTIES IN THE APPLICATION OF THE OFFER AND ACCEPTANCE TEST

In the first place it is apparent that the question of whether a contract has been formed in cases of mistaken identity cannot always be answered by asking the simple question "to whom was the offer made?" If every agreement is to be analysed as the acceptance of an offer, one side must have made the offer and one the acceptance. If it is the offeror (A) who is the victim of a hoax by the offeree (B) it is appropriate to ask whether A's offer was made exclusively to C, whom B pretends to be. But if B, pretending to be C, made the offer to A and A apparently accepted it, we have to ask to whom the acceptance was made. An "acceptance" can only be made to an offeror; if it is addressed to anyone else it cannot be an acceptance. So the question is more properly: *was there an acceptance?* But this question fails to raise the issue neatly, and it may therefore be thought preferable always to treat the mistaken party as the offeror, even though he was in fact the offeree. This is artificial, but it makes the problem appear easier. Accordingly in *Ingram v. Little* Slade J. treated the ladies as the offerors and "for convenience" Pearce L.J. did likewise, while admitting that "it may well be" they were in truth the offerees.²⁷ Devlin L.J., preferring accuracy, regarded them as offerees.²⁸

It may be wise to avoid the difficulty altogether by asking simply with whom the innocent party intended to contract, though the true question is doubtless that framed by Professor Goodhart: "what did the promisor promise and how should this be interpreted?"²⁹

Far more difficult than deciding how the question is to be asked is deciding how it is to be answered. As an illustration one may take the most famous of all cases of *error in persona*, *Cundy v. Lindsay*.³⁰ Did Lindsay, whose letters and goods were addressed

²⁷ p. 56.

²⁸ p. 64.

²⁹ 57 L.Q.R. 228 at p. 231.

³⁰ (1878) 3 App.Cas. 459. Blenkarn ordered handkerchiefs from Lindsay, writing from his address, 37 Wood St. but making his signature look like "Blenkiron & Co." W. Blenkiron & Son, whose address was 123 Wood Street, were known by Lindsay to be respectable.

to "Messrs. Blenkiron & Co., 37, Wood St.," intend to contract with Blenkarn of 37, Wood St. or with W. Blenkiron & Son of 123, Wood St.? The judiciary were much divided in their answer. Blackburn J. took the view that "the intention of the plaintiffs was to contract with the person who was carrying on business at 37, Wood St."³¹; and Mellor and Lush JJ., the other members of the court of first instance, agreed. But both appellate courts took the opposite view.³² In the House of Lords Lord Cairns was quite satisfied that "with him [Blenkarn] they never intended to deal"³³; Lord Hatherley stated that "they never sold in any way to Blenkarn"³⁴; and Lord Penzance that "no contract was ever intended with him."³⁵

Other cases may be less difficult, but the problem can be particularly intractable in the "face to face" situations. Thus in *Phillips v. Brooks Ltd.*,³⁶ did the jeweller intend to contract with the person on the other side of the counter (North) or the person whom the customer stated he was (Sir George Bullough)? In truth, as Dr. Glanville Williams has pointed out,³⁷ the intention in such a situation is really to contract with an imaginary composite person; thus the jeweller meant to deal with a person combining the name and affluence of Sir George with the physical attributes of North. How then can one say as a question of fact that he intended to contract with either individual part of this composite person rather than the other? But the judge took the view that the jeweller "intended to contract with the person present"³⁸ (despite the fact that the jeweller stated in the witness box that he had no intention of making any contract with anyone other than Sir George).³⁹ Professor Goodhart considers the decision wrong⁴⁰; and in *Lake v. Simmonds*⁴¹ Viscount Haldane justified it on different grounds.⁴² In *Ingram v. Little* Sellers L.J. referred to the criticism it had received, but did "not feel justified in saying it was wrong" since it had stood for so long and was "a decision within an area

³¹ (1876) 1 Q.B. 348 at 355.

³² The Court of Appeal ((1877) 2 Q.B. 96) seemed chiefly influenced by the fact that the court below had admitted that Blenkarn had been correctly convicted of obtaining the goods by false pretences and considered that it was contradictory to hold that "there was a valid sale."

³³ At p. 465.

³⁴ At p. 469.

³⁵ At p. 471.

³⁶ [1919] 2 K.B. 243.

³⁷ 23 *Canadian Bar Review* 271 at p. 275.

³⁸ At p. 246.

³⁹ At p. 246.

⁴⁰ 57 L.Q.R. 228 at pp. 240-241.

⁴¹ [1927] A.C. 487.

⁴² "The misrepresentation was only as to payment" (p. 502). This explanation of the decision had been proposed by Professor E. C. S. Wade in (1922) 38 L.Q.R. 201. It is strongly criticised by Sir Carleton Allen in 44 L.Q.R. 72.

of fact ”⁴³; and Pearce L.J., while not finding it “easy to evaluate ” concluded that it was “a borderline case decided on its own particular facts.”⁴⁴

One turns therefore with some interest to see how the attempt to discover the innocent party’s intention fared in *Ingram v. Little*. Two judges were confident in their answer. Slade J. at first instance said “I have not the slightest hesitation in reaching the conclusion that the offer which the plaintiff . . . made . . . was one made solely to . . . Philip Gerald Morpeth Hutchinson.”⁴⁵ In the Court of Appeal Sellers L.J. agreed that “the conclusion so reached seems self-evident.”⁴⁶ But the other two members of that court were far from sure. Pearce L.J. regarded it as “a borderline case ”⁴⁷ and expressed the dilemma thus: “it is not easy to decide whether the vendor was selling to the man in her drawing room (fraudulently misrepresented as being a man of substance with the attributes of the real Hutchinson) or to P. G. M. Hutchinson of Stanstead House (fraudulently misrepresented as being the man in her drawing room). Did the individuality of P. G. M. Hutchinson of Stanstead House or the physical presence of the man in the room preponderate? ”⁴⁸ However he felt that the view of the trial judge on this question of fact should not lightly be discarded, and he was not disposed to disturb the finding of Slade J.

But the problem is even more squarely faced by Devlin L.J. He insists that in a situation of this nature the question of with whom the innocent party intended to contract cannot be solved as a pure question of fact. “If Miss Ingram had been asked whether she intended to contract with the man in the room or with P. G. M. Hutchinson the question could have no meaning for her, since she believed them both to be one and the same.”⁴⁹ If an issue was not present to a person’s mind at the time of the transaction, how can that person be said to have had any precise intention in the matter? Naturally, when in the light of later knowledge he discovers his mistake, he will be inclined to claim that his intention was such as will enable him to recover the property with which he parted; but this will be to impute to himself an artificial intention he cannot really have held at the critical moment. The only real fact was that he did enter into an ostensible agreement with the person present. Thus “all that Miss Ingram or any other witness in her position can say is that she did in fact accept the offer made

⁴³ [1961] 1 Q.B. 31, at p. 51.

⁴⁵ p. 59.

⁴⁷ p. 59.

⁴⁸ p. 59.

⁴⁹ p. 65.

⁴⁴ p. 60.

⁴⁶ p. 49.

to her; and that if she had not been tricked or deceived she would not have accepted it.”⁵⁰

The practical difficulty that is experienced in applying the offer and acceptance test in the face-to-face situations stems therefore from the inescapable fact that the only actual intention at the time was to make an agreement with the person present, even though there would have been no such intention had the truth been known.

4. A NEW SOLUTION?

Because of this difficulty in attempting to solve the question of whether offer and acceptance had taken place between these parties as a pure question of fact, Devlin L.J. considered that the question should be treated as “a mixed question of fact and law,”⁵¹ and that a presumption should be applied. It is often the practice of the law, as he observed, to apply a presumption to determine the intention of the parties in matters concerning contracts when no real intention existed because the matter was not adverted to at the time the contract was formed. As an example he mentioned the selection of the “proper law” of a contract.⁵² A further example might be the presumption that the parties intended to create legal relations. So here, said Devlin L.J., there should be a presumption “that a person is intending to contract with the person to whom he is actually addressing the words of contract.”⁵³

Was there any authority for this? Devlin L.J. referred to two American decisions⁵⁴; and he stated that *Benjamin on Sale* adopts this proposition—though it must be respectfully pointed out that although Benjamin first says “there is prima facie a contract of sale” with the person present,⁵⁵ he later concludes that “where the person addressed is using an assumed name . . . it is a question of fact whether the offer or acceptance was addressed to him personally or not.”⁵⁶ *Phillips v. Brooks Ltd.* was also mentioned, as Horridge J. had there adopted both the headnote and part of the judgment in the earlier of the American cases⁵⁷; but the

⁵⁰ p. 65.

⁵¹ p. 65.

⁵² Where a contract has a foreign element the law of the country which governs the contract is known as the proper law of the contract. This example is not perhaps entirely happy, because modern authority has laid down that the proper law is not to be determined simply by the application of presumptions: see *The Assunzione* [1954] P. 150; *Tomkinson v. First Pennsylvania Banking Co.* [1960] 2 W.L.R. 969.

⁵³ p. 66.

⁵⁴ *Edmunds v. Merchants Despatch Co.* (1883) 135 Mass.Rep. 283; *Phelps v. McQuade* (1917) 220 N.Y.Rep. 232. *Corbin on Contract* (1951) Vol. 3, s. 602, p. 385 was also cited.

⁵⁵ 8th ed., p. 102.

⁵⁶ p. 107.

⁵⁷ *Edmunds v. Merchants Despatch Co.*, *supra*.

passages quoted from the American authority do not expressly mention a presumption, and although Horridge J. said that he himself had to decide what was the proper inference to draw, his conclusion ("I think the seller intended to contract with the person present" ⁵⁸) did not appear to be the result of the application of any presumption.

Furthermore the one House of Lords authority in the field of error *inter praesentes*, *Lake v. Simmons*,⁵⁹ was on the face of it somewhat antagonistic. The question there, it will be recalled, was whether a woman who had induced a jeweller to hand her two pearl necklaces by fraudulently pretending she was the wife of a certain person to whom she wished to show the necklaces with a view to purchase, was a "customer" to whom the necklaces had been "entrusted" (within the terms of an exception clause in an insurance policy). The leading speech of Viscount Haldane admittedly ran clean counter to Devlin L.J.'s proposition, for he said that the jeweller "never intended to contract with the woman" ⁶⁰ and that there was no consensus between them. Viscount Sumner also emphasised the advantage possessed by the trial judge in deciding what was the jeweller's state of mind.⁶¹ But after making a most valuable analysis of the speeches Devlin L.J. reached the conclusion that the *ratio decidendi* did not lie in Viscount Haldane's speech, and that the case was an authority only for the interpretation of the terms of the insurance policy—the woman was not a "customer." This is surely a welcome view of *Lake v. Simmons*, for it means that the major question of the effect of error *inter praesentes* remains open for consideration by the House.

It meant further that Devlin L.J. was free to take the view that while offer and acceptance remain of course the first requirement for formation of a contract, a person can be presumed to intend to contract with the person he is actually addressing; or more precisely (for the other members of the court seemed ready to make such a presumption *initially*) that this presumption is not rebutted by proof that the speaker (A) would not have addressed his words of contract to B if he had not thought that B was C.

But the presumption is not meant to be completely irrebuttable. Devlin L.J. considered that it would be rebutted if B posed as an agent, for here the intention would clearly be to contract not with B, but with B's principal; so that if B had no actual or ostensible authority there would be no contract.⁶²

⁵⁸ p. 284.

⁶⁰ At p. 500.

⁶² pp. 66, 67. This would explain *Hardman v. Booth* (1863) 1 H. & C. 803.

⁵⁹ [1927] A.C. 487.

⁶¹ At p. 504.

No further examples were given of when the presumption would be rebutted. But one may consider the case where A on being approached by B refuses to deal with him, and B later returns disguised as C and A then makes the very agreement he at first refused to make. Surely here the presumption that A intends to contract with the person he is addressing must be rebutted.

The next question concerns the circumstances in which the presumption should arise. If it is to apply when the parties are face to face it must do so equally when they are talking to each other by telephone or radio. Should it apply if A writes a letter to C at B's address? Clearly it should not, for normally it will be possible to ascertain whether A meant to contract with B or with C. But if A has written on several occasions to B's address carelessly thinking he is dealing with C, the law ought to be reluctant to allow A to assert that he intended to deal with C alone; and more reluctant perhaps than it was in *Cundy v. Lindsay*.⁶³ There, after all, Messrs. Lindsay had written several letters and sent several consignments of goods addressed to "Messrs. Blenkiron & Co., 37, Wood St."; and on not being paid had first brought an action against Blenkarn himself for the price.⁶⁴ On an objective approach it would seem reasonable to assume that the intention had not been throughout to deal exclusively with W. Blenkiron & Son of 123, Wood St.

The application of a presumption certainly cuts through the initial difficulty in the error *inter praesentes* situation; but it does not by itself solve the problem. Its advantages cannot therefore be fully assessed until the remaining part of the new solution has been considered.

5. THE NEW SOLUTION: SECOND STAGE

Although Devlin L.J. is prepared to presume that an offer (or acceptance) is made to the person addressed, he does not thereby dispose of the question of mistake of identity. The contract that has apparently been formed may even so be a nullity; for "contracts in which identity really matters may still be avoided on the ground of mistake."⁶⁵ In a sense then this new solution merely puts the problem back a stage, for after presuming offer and acceptance one has then to ask whether the agreement is vitiated through mistake of identity. But this can only happen if the mistake is fundamental.

⁶³ *Supra*.

⁶⁴ See the statement of facts at (1878) 3 App.Cas. 460. It was because this action failed to produce satisfaction that an action was brought against Cundy.

⁶⁵ p. 67.

Now the attraction of C. J. Slade's thesis ⁶⁶ is that it appears to remove the question of mistake of identity from the arena of doubt in which the other varieties of mistake find themselves, placing it instead on the more tangible plane of simple offer and acceptance. But offer and acceptance does not provide a satisfactory test in the face-to-face situations; and if we therefore apply the presumption suggested we are returned again to the arena of mistake. It is essential in that case that we then have some reasonably certain yardstick available by which to determine whether the mistake of identity is to be deemed "fundamental" so as to vitiate the agreement.

What is suggested? Taking what appeared to be the widest view of mistake to be found in the authorities Devlin L.J. stated that "a mistake avoids the contract if at the time it is made there exists some state of fact which, as assumed, is the basis of the contract and, as it is in truth, frustrates its object." ⁶⁷ This definition of a vitiating mistake would seem to be culled from the speeches of the House of Lords in *Bell v. Lever Bros.*, ⁶⁸ where the mistake was that of both parties, not of one; and Lord Atkin gave warning that "the legal effect may depend on the class of mistake." ⁶⁹ Yet simplicity and elegance would be strikingly served if a single test could establish whether a properly formed contract is to be vitiated (1) by a unilateral mistake of identity of a contracting party, ⁷⁰ (2) by a common misapprehension of fact, (3) by a subsequent change in circumstances making performance impossible or sterile. ⁷¹

Now the scope of (2) and (3) is very narrow. Common mistake, as a vitiating factor at common law, is rigidly confined, applying only, it may be, to the case of a *res extincta* or closely similar situation. ⁷² (Equity on the other hand may be able to grant relief, on terms, more widely. ⁷³) Frustration occurs only when a contractual obligation "becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." ⁷⁴ Mistake of identity must therefore be equally

⁶⁶ *Supra*, note 1.

⁶⁷ pp. 67, 68.

⁶⁸ [1932] A.C. 161. See also *Norwich Union Fire Insurance Soc. Ltd. v. Price* [1934] A.C. 455.

⁶⁹ p. 217.

⁷⁰ The mistake of the one must be known to the other or the mistaken party will be subject to estoppel.

⁷¹ The link between frustration and common mistake was emphasised by Mr. Slade—70 L.Q.R. 385 at p. 403.

⁷² See *Bell v. Lever Bros.*, *supra*. Cheshire and Fifoot (*The Law of Contract*, 5th ed., p. 184) maintain however that the common law has no doctrine of common mistake as such.

⁷³ See *Solle v. Butcher* [1950] 1 K.B. 671.

⁷⁴ *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] A.C. 696 at pp. 728-729.

narrow in its operation; and furthermore, as Devlin L.J. observed, the law must act here (just as in cases of frustration, and in those cases such as *Scammell v. Ouston*⁷⁵ where there is failure to reach agreement on essentials) "irrespective of the intentions or opinions or wishes of the parties themselves."⁷⁶

When in practice then does a mistake of identity "destroy a fundamental assumption and frustrate the object of the contract?"⁷⁷ Devlin L.J. considered that Pothier's example of a contract to paint a portrait was sound (though Pothier's principle, if correctly translated, was too wide for English law).⁷⁸ Thus if A wished C to paint his portrait and made the contract with B whom he mistook for C, the contract would be void because the identity of the artist was essential (though it should be observed that in English law one would need to add the requirement that B knew or ought to have known of A's mistake).⁷⁹

The mistake which the ladies made in *Ingram v. Little* was not thought by Devlin L.J. to be fundamental. His reason was that it was not really a mistake of identity, but merely of creditworthiness; and that creditworthiness "is not a basic fact; it is only a way of expressing the belief that each party normally holds that the other will honour his promise."⁸⁰

Now it is apparent that creditworthiness should not (normally at least) be regarded as "basic" to a contract; for even where the contract is to sell on credit to someone at present insolvent he may in the end fulfil his obligation. But if A contracts with B when he meant to contract with C whom he believed to be affluent, has he not made a mistake of identity as well as creditworthiness?

The reason why Devlin L.J. took the view that in this case "identity . . . did not really matter"⁸¹ was the weakness of the evidence that supported the two main representations, namely (1) that B was C and (2) that the cheque would be met. Thus he said "the fact that [B] gave [C's] address in the directory was no proof that he was [C]; and if he had been, that fact alone was no proof that his cheque would be met."⁸¹

But, with respect, in every case of mistaken identity there will *ex hypothesi* have been a failure by B to *prove* he was C; and although victims of fraud may vary in their credulity their mistake remains one of identity even though it was made stupidly. Again there will rarely, if ever, be conclusive evidence that a cheque will be met, but the strength of the evidence from which the inference

⁷⁵ [1941] A.C. 251.

⁷⁷ p. 68.

⁷⁸ See note 8, *supra*.

⁷⁹ See note 70, *supra*.

⁸⁰ p. 69.

⁷⁶ p. 68.

⁸¹ p. 68.

is (wrongly) drawn should not affect the nature of the mistake that is made.

Perhaps it may be suggested that some confusion has crept in here through failure to bear in mind the lesson that Dr. Glanville Williams stressed sixteen years ago.⁸² A person, he said, is only a "bundle of attributes," with the consequence that "error of identity . . . can be reduced verbally to error of attributes." If A wishes to be painted by the talented artist C and B pretends he is C, A has made a mistake of thinking that the person before him has the desired attribute of skill in painting. His concern is not really to contract with C as C, but rather to contract with C because C possesses this particular attribute. Even more obviously if A is selling on credit and believes that C, but not B, is creditworthy, his concern and mistake is in essence that the person before him has the attribute of creditworthiness.⁸³

Nevertheless it is the tradition of English law not to eliminate the concept of identity in this way but to preserve it, and indeed to contrast it with attribute. Thus English law says that a mistake of identity has occurred if there has been a confusion of the attributes of two persons⁸⁴ (in which case the contract may sometimes be void). If on the other hand there was confusion as to the attributes of one single person the contract is not void.⁸⁵ As therefore the mistake made by the ladies in *Ingram v. Little* concerned the attributes of two persons, identity was not immaterial, and the mistake should properly have been described, it is submitted, as one of identity.

Devlin L.J.'s proposition therefore could perhaps be expressed in this way: that a mistake of identity is not fundamental if the material attribute is one of creditworthiness, whereas it would be if the attribute was one of personal skill such as painting. Thus the second mistake but not the first would vitiate a contract *prima facie* made by the parties.

There is clearly much to be said for this view, though one has next to inquire whether mistakes of identity concerning other types of attribute should or should not be classed as fundamental. Suppose I make a contract with the man standing before me, mistaking him for his twin brother against whom I have a set-off? Presumably in most circumstances my mistake does not frustrate the object of this contract and it will not be void. Or again if I intend to make a contract for the granting of a lease of my café to

⁸² (1945) 23 *Canadian Bar Review* 271 at p. 273.

⁸³ *Fawcett v. Star Car Sales Ltd.*, *supra*, provides a striking example. A's concern was that the person with whom he was dealing owned the car.

⁸⁴ See Dr. Glanville Williams 23 C.B.R. at p. 279.

⁸⁵ This is clearly established by *King's Norton Metal Co. v. Edridge*, *supra*.

C (who has no criminal record) but mistakenly make my agreement with B (who has been convicted of permitting disorderly conduct in a café) my mistake is hardly fundamental; for it cannot be said to frustrate the object of the contract if C is capable of performing all its requirements.⁸⁶ But if I mistakenly propose to the twin sister of my intended fiancée, my mistake must clearly be fundamental and the contract of engagement a nullity.

CONCLUSION

It is suggested that where two parties outwardly appear to have reached agreement with each other it is generally artificial to deny that offer and acceptance have taken place, and that the law should adopt Devlin L.J.'s solution of inquiring instead whether a mistake by one as to the other's identity is fundamental to the contract, rendering it void. This has the practical consequence that because mistake of identity will rarely be regarded as fundamental, such a mistake when the parties are face to face will only infrequently vitiate the contract. That itself is desirable because the law should not be a destroyer of contracts which the parties have apparently made, particularly when this may spell disaster for innocent third parties.

This does not necessarily mean there is no redress. If, as is generally the case here, fraud was employed to induce the mistake, the victim has his remedies of rescission and damages; if the misrepresentation was innocent he will normally be entitled to rescission. But where the victim has parted with property which has then passed into the hands of a third party he may find himself seriously prejudiced. For in this case, unless he can prove bad faith on the part of the recipient (which is very unusual) he is left with only a frequently illusory remedy against the trickster.

If on the other hand the victim is allowed to establish that his contract was void the innocent third party is placed in the same unfortunate predicament. And so, whether the majority or minority view in *Ingram v. Little* is to be preferred, one is left with an unsatisfactory situation. Admittedly the result flows inexorably from first principles: property cannot pass by sale without a contract; and the later contract of sale cannot pass property that is not the seller's to pass. On other hand if the first contract of sale is voidable rather than void the property does pass; and if the second contract is made with a buyer in good faith before avoidance, the defect in title is cured and his position is secure.⁸⁷

⁸⁶ If, as in *Sowler v. Potter* [1940] K.B. 271, B and C are really one person there is not even any mistake of identity, as Professor Goodhart has shown: 57 L.Q.R. 228 at pp. 241-244.

⁸⁷ Sale of Goods Act, 1893, s. 23.

It is here that Devlin L.J. makes his most trenchant criticism of all. Why should the defendant's liability for the tort of conversion depend on whether, because of inferences drawn from a conversation in which he took no part, the first contract was void or voidable? "The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice."⁸⁸ Here the question should not be whether the contract was void or voidable, but which of the two innocent parties should suffer. And to that question "the plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part."⁸⁹

Moreover, as the learned Lord Justice also observed, the Law Reform (Married Women and Tortfeasors) Act, 1935, the Law Reform (Frustrated Contracts) Act, 1943, and the Law Reform (Contributory Negligence) Act, 1945, all evidence a modern inclination towards apportionment of loss by the court; and these statutes "have worked satisfactorily."⁸⁹ Assuming therefore that the proposal is confined to situations where the owner has deliberately handed over his goods under an apparent sale, the case for implementing it by legislation seems well-nigh overwhelming.

But while legislation is awaited, what are the courts to do? Lord Cairns in *Cundy v. Lindsay* was in no doubt; they must "apply, rigorously, the settled and well-known rules of law."⁹⁰ Nevertheless it may be asked why the rigours of the orthodox rules (assuming these to be settled) could not be mitigated in appropriate circumstances by the doctrine of estoppel. If an owner has carelessly handed over goods with the ostensible intention of passing the property, should he not be estopped from relying on his mistake as against a third party who has purchased them in good faith? ⁹¹ If in particular he has taken a chance by parting with a car to a stranger (however plausible) before clearing the stranger's cheque, should he still be at liberty to plead his mistake in order to establish conversion by the stranger's customer?

Unfortunately the majority decision of the Court of Appeal in *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd.*⁹² seems to stand in the way of the application of estoppel in these circumstances. There, admittedly, the owner who carelessly handed over

⁸⁸ p. 73.

⁹⁰ (1878) 3 App.Cas. 459 at p. 463.

⁹¹ See Sale of Goods Act, 1893, s. 21 (1).

⁹² [1957] 1 Q.B. 371.

⁸⁹ pp. 73, 74.

his car and its registration book to a rogue and who was held not to be estopped from denying the rogue's right to sell it to the defendant, had never intended to transfer the property to the rogue himself (but to a finance company from whom the rogue was to hire it). But the judgment of Morris L.J. (one of the majority) shows that the operation of estoppel is now so restricted that it would not even apply (normally) where the owner had, through negligence, ostensibly transferred the property to the rogue himself; for "the element of negligence . . . involves . . . a duty to take care. . . . That in turn raises the question as to whom the duty is owed. So as to cover every potential purchaser it must therefore be asserted that the owner owes a duty to the whole world."⁹³ Such a proposition was not acceptable to the majority.⁹⁴ "It cannot be that ownership is lost on the basis of enduring punishment for carelessness."⁹⁵ It is not surprising therefore that the possibility of estoppel was not mentioned in the judgments in *Ingram v. Little*.

What is more curious perhaps is that no notice seems to have been taken of the view that has been propounded by Denning L.J. that the common law rules of mistake have been superseded by equity. Thus in *F. E. Rose Ltd. v. W. H. Pim Ltd.* he declared that "at the present day, since the fusion of law and equity, the position appears to be that, when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning."⁹⁶

It is a pity that more attention has not been paid by the judiciary to this suggestion, because it could offer a means whereby the courts could extricate themselves from the rigid position into which the common law has led them. But it is doubtful whether the Judicature Act, 1873, was intended to have consequences of this nature; and it is suggested that the most desirable course would be for Parliament to provide in clear terms for the discretionary apportionment of loss where property has ostensibly been transferred by A to an insolvent or untraceable rogue B and by him to an innocent purchaser C. Thus would the courts be spared the unenviable task of having (in Lord Cairns' words)⁹⁷ to "apply rigorously" rules which must inevitably inflict hardship on one party or the other.

⁹³ At p. 393.

⁹⁴ The dissenting judgment of Denning L.J. offers strong support for a wide application of estoppel.

⁹⁵ At p. 394.

⁹⁶ [1954] 2 All E.R. 734 at p. 747. See also *Solle v. Butcher* [1950] 1 K.B. 671 at p. 693.

⁹⁷ (1878) 3 App.Cas. 459 at p. 463.

THE NORM IN THE BOTTLE

B. E. KING

“ *Philosophy is a battle . . . to show the fly the way out of the fly bottle.*” WITTGENSTEIN

Introduction to Jurisprudence,¹ by the Quain Professor of Jurisprudence in the University of London, is an important work by a widely read author which should leave its mark, for better or worse, on all subsequent textbooks of Jurisprudence published in this country. In the breadth of the literature drawn on; in the attempt to evolve a textbook for students from a combination of readings and commentary; in its limitation of topics, it explores new ground. Its incursions into contemporary philosophy make it improbable that a textbook on Jurisprudence will ever again be attempted in this country by a lawyer who does not also claim to be a philosopher.

Professor Jerome Hall, in his *Readings in Jurisprudence* (1938), omitted the traditional analyses of such particular subjects as property, ownership, tort and crime, as better left to the specialists in those subjects. Professor Edwin Patterson, in his *Jurisprudence—Men and Ideas of the Law* (1953), went one further and cut out the analysis of rights. This example is followed by Professor Lloyd, who is thus left only with sections on “Nature of Jurisprudence” and “Meaning of Law,” eight sections on the various theories of law and schools of writers, and a section on “Judicial Process.” Sore as is the need for the pruning of Jurisprudence as an examination subject it is suggested that this carries the process a little too far. It is based on no intelligible principle. Indeed Jurisprudence as a subject would seem to have lost its bearings. This book, useful as it is in many aspects, marks one more stage in its decline from the coherent intellectual disciplines of Austin, Holland, Salmond, Kelsen, Ross—to a hotch potch.

The truth is that Jurisprudence—once, in Austin’s words, the Philosophy of Positive Law—is ceasing to be a subject, much less a discipline, whose subject-matter is legal systems. Its original subject-matter, positive law, has been overlain and replaced by its literature. So that the subject-matter of Jurisprudence now

¹ *Introduction to Jurisprudence*—with selected texts. By Dennis Lloyd, M.A., LL.D. (Cantab.), Quain Professor of Jurisprudence in the University of London. [London: Stevens & Sons, Ltd. 1959. xxiii, 472 and (index) 10 pp.]

appears to be less distinctly law itself than the views about law of the theorists. Thus Professor Lloyd, unlike Austin, makes but little attempt to provide the student of jurisprudence with a coherent picture of law, or of "what is essential to law" (which surely must include the analysis of rights and other fundamental legal conceptions), or to analyse the meaning of "certain leading terms which we must necessarily employ." He thus ignores the warning of Austin² that "unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk." The coherent picture he tries to give is not one of the subject-matter, law, but of the subject, jurisprudence, so that the student may be "acquainted with the theories, attitudes and insights of leading jurists from selected texts culled from their own writing" (370 pages, devoted to extracts from sixty writers) connected by a full commentary (102 pages) "setting out the background and inter-connections between the differing approaches, and a critical appraisal of the viewpoints illustrated" (p. xi). But the literature of jurisprudence cannot readily be made to cohere, save in its relation to the framework which might be afforded by the sort of clear and detailed theory of law which the author has failed to provide.³ "There is a great danger," Professor Lloyd tells us, "that if we take the watch to pieces and analyse each part separately, we will never attain the overall picture which shows us how it works" (p. 302). True enough, possibly, but when a Professor of Watches speaks like this, surely it is time to take alarm?

How can we tell, without detailed and rigorous analysis, whether our overall pictures are not "tissues of uncertain talk"? An answer is suggested by the extract given from Karl Popper's *Philosophy of Science*: "... deductive logical reasoning remains all important for the critical approach . . . because only by purely deductive reasoning is it possible for us to discover what our theories imply, and thus to criticise them effectively. Criticism . . . is an attempt to find the weak spots of a theory, and these, as a rule, can be found only in the more remote logical consequences which can be derived from it" (p. 20). This is the justification of Austin's method (though not of his premises), which is seemingly repudiated by Professor Lloyd on p. 36. If, however, we are not to risk analysing legal systems in detail, or to be supplied by our textbook writers with jurisprudential notions clear enough to be capable of analysis, then jurisprudence will indeed be condemned

² *Lectures* (1885) at p. 1075.

³ See the present writer's "An Approach to Jurisprudence," *Butterworth's South African Law Review* (1956) p. 175.

to be the mere and ever waxing accumulation of the theories and approaches of other writers, rather than the construction or selection of "the fittest theory within our reach, by the elimination of those which are less fit" (p. 21). But what else can one expect of a subject honoured by such neglect that Professors of the Philosophy of Law have to write as lawyers and not as philosophers, fully conscious of their lack of competence to evaluate philosophical theories, and indeed not presuming to embark on matters of high philosophy (Preface, pp. xiv and xv)? And yet one can only be grateful that Professor Lloyd attended the seminar of Wittgenstein at Cambridge, and has introduced the student to his purgative approach.

We are, indeed, told, quite dogmatically, that human laws are rules or norms (p. 5). What norms are, however, is left veiled in the deepest obscurity. At first they seem to be the same as normative rules, stating what should or "ought" to happen,—which makes them a kind of statement. This directs our attention to the meaning of "ought," which we are told does not necessarily imply moral obligation, for "in relation to a purely positive rule, such as a legal duty of care, the 'ought' merely relates to the duty of compliance with the rule on pain of suffering the prescribed penalty" (p. 5). In effect what we have been told by the section on "Normative" Character of Law is that human laws relate to legal duties and do not state facts, but are norms. We are little wiser, since "legal duties," like "ought" and "norm," are left undefined.

In the next section, "Ought" and "Is," we are told that a normative statement cannot be inferred from a purely factual one. There is "an unbridgeable gap between 'ought' and 'is,' or norm and fact" (p. 6). From this it appears that normative statements state norms in the same sort of way that factual statements state facts. So that norms are not statements after all. But we now know that they are not facts either,—and since we have been told that human laws are norms, we know too that human laws cannot be facts. They do however (whatever they may be) prescribe courses of conduct, implying that they are derived from a valid authority (p. 6). This suggests that they are commands, and one immediately thinks of the lawgiver, implying that he has valid authority to prescribe conduct. But no. "Such authority can, as both Hume and Kelsen have pointed out, only consist in another normative statement" (p. 6). This seems to leave us with an infinite regression. Ultimately, however, we are told on p. 303, we come to a rule (? statement) which is the outer limit of the system, and this ultimate norm is valid because it is treated as valid within

the legal system itself. What constitutes treating it as valid we are not told. But from the context it appears evident that it is not the same as *de facto* obedience,—and the validity conferred is not legal validity, since it is said to be senseless to ask for a legal validation of an ultimate norm (p. 303, n. 33). This validity does however amount to existence, since the “existence” of a norm simply means that it is valid within a particular context (p. 297). So a legal norm would seem to exist finally because it is treated as existing. No wonder it cannot be described as a fact. But one sighs for a Wittgenstein to suggest to the Professor a way out of his bottle!

Is it perhaps helpful to conceive legal norms as symbols of conduct, accepted as authoritative guides to patterns of action, and expressed in propositions stating that certain consequences ought to follow on certain antecedents? This conclusion is almost reached on p. 242; the notion, which stems from Olivecrona, is not essentially different from that of Ross,—and is consistent with the opinion of Hume, expressed on p. 297, that normative rules are merely relative to the subjective opinions of human beings. If this conception were adopted it would follow that law, as a system of norms, and as a form of social control, could no longer appear as “equally legitimate fields of study and inquiry” (p. 8), but would be seen as one and the same phenomenon. There would be no further “Need for a Synthesis” (p. 8), or need to attempt to define, as Professor Lloyd does not, the legal process of which each is said to represent an equally vital aspect. Further this “unifying concept” might elucidate for Professor Lloyd a good deal of what he calls the “conceptual” kind of jurisprudence (p. 7) or the “conceptual aspects of legal method” (p. 9), and reduce a good deal of the buzzing from the “ought” bottle. For on this view a normative statement cannot indeed be deduced from a statement of fact,—but it can, by analysis, be reduced to one. And since ultimate norms can be reduced to facts there is no puzzle about their validity. But these are suggestions,—not, in the manner of Professor Lloyd, dogmatic statements. They are all hypotheses—that these are the concepts best fitted to construct a theoretical model of legal systems, to interpret the lawyer’s experience of what is loosely called “positive law.” They are the fruits of the scientific method which Professor Lloyd describes in his extracts and ignores in his connecting commentary.

“The history of science bears ample witness to the truth that the development of knowledge is dependent upon the formation of fruitful hypotheses” (Cairns, *Theory of Legal Science*) (p. 22). “. . . at no stage of scientific development do we begin without

something in the nature of a theory . . . and in the social sciences it is even more obvious than in the natural sciences that we cannot see and observe our objects before we have thought about them. For most of the objects of social science . . . are theoretical constructions . . . are the result of constructing certain models . . . in order to explain certain experiences " (Popper, *Poverty of Historicism: Method of Science*) (p. 17). But Professor Lloyd constructs no model of a legal system, puts forward no fruitful hypothesis in the form of a suggested definition of law. Conceptual pragmatism receives no attention, and, save for a possible hint at the end of note 13 on p. 34, the lessons of Kantorowicz in his *Definition of Law*, which gets mentioned in footnotes, are ignored. Yet Professor Lloyd is by no means unaware of the nature and importance of definitions. He fails to appreciate that to adopt a definition of law is to regard all the elements in that definition as "logically inherent" in all legal systems—and that Austin and Kelsen should do so appears to surprise him (p. 7). But he realises that disputes about definitions are not merely verbal disputes, and that a good definition must be so appropriately correlated to the phenomenon being described that an analysis of its meaning will display the nature of the facts involved (p. 35). Again he appreciates that a definition may be a linguistic suggestion, which cannot be true or false, but may be conditioned by ideological motives. His neglect, however, of the theoretical functions of a scientific definition of law leads him badly astray in his suggestions for its construction.

In his criticism of Austin Professor Lloyd suggests that to define law one should begin (*contra* Popper) by "discussing and analysing the relevant phenomena" (p. 36). These are, to begin with, "the phenomena of legal activities to which this word is usually appropriated" (p. 34). (This looks perilously like the fallacy of "Essentialism" (p. 33) since he appears to be assuming that the activities called legal really are legal,—but this is probably merely an oversight.) Also there are some borderline or peripheral matters to be examined. A choice or decision will have to be made. So far we may agree with him. The crux of the matter is, of course, the criteria for this choice. A model of law or of a legal system is being devised, presumably in order to help us understand and explain "by way of reduction, or deduction from hypotheses" (p. 18) (why else all these extracts from Popper?) certain relevant experiences. Perhaps we should choose, as the basis of our definition, those facts which will give us the most fruitful discoverable starting point for analysing the internal structure of these experiences—the

lawyer's specific experiences—and exploring their external relations? No, says the Professor, we must not do anything nearly so enterprising. There is to be none of Popper's "boldly proposing theories" (p. 20). The tag *omnis definitio in jure civili periculosa est* is held up as a warning, as if law itself were a civil law concept, like *culpa* or *bona fides*, and its definition subject to similar criteria, functions and dangers. "The requirements of a 'good' definition of law should therefore (a) include what is generally accepted as properly within this sphere; (b) exclude what is universally regarded as not being 'law'; and (c) include or exclude borderline cases in the light of a reasoned comparison of the phenomena in question" (p. 34). Of this it may be said that it bears no necessary relation whatever to the hint contained in footnote 13 on the same page to the effect that the test of a good definition is its results in illuminating the facts in the field of its application. It is meaningless in default of an explanation—which we are not given—of how to select or eliminate phenomena "suitably," by the process of "reasoned comparison." And requirements (a) and (b) are the way to stifle all originality, reject the efforts of the inventive or creative philosophical imagination,⁴ and to kill jurisprudence as dead as mutton. In what other science does basic theory allow the content of its concepts to be so governed by *vox populi*?

It must not be assumed from the foregoing that this Introduction is thought to lack merits. It is only because of its many and real merits that it has been thought profitable to point out what the writer cannot help regarding as serious flaws. What the writer regards as a misunderstanding of the nature and function of a theory of law not only deters the author from constructing his book around his own conception of law, but militates against a proper understanding and presentation of the theories of others. "Every jurist," we are told on p. 1, has "his own notion of the subject-matter and proper limits of jurisprudence." But we are never

⁴ See *The Revolution in Philosophy* (Macmillan & Co., Ltd., 1956), at p. 107: "There is another kind of thinking which might be called the creative or constructive work of the philosophical imagination. To engage in this kind of thinking is to consider how, without the nature of the world being fundamentally different, we might nevertheless view it through the medium of a different conceptual apparatus, might conduct our discourses about it in forms different from, though related to, those which we actually use" (P. F. Strawson). And at p. 121: "Instead of testing the concepts we actually employ . . . we may suppose the facts to remain unchanged but the concepts we employ to be different. In other fields invention of this kind is not unfamiliar; it is essentially what Copernicus did in astronomy, or Einstein in physics; they were important, that is, not as the discoverers of new facts, but as the inventors of new ways of looking at old facts. The post-Copernican astronomer was not in possession of new truths about the heavens, but of a new conceptual system for organising the truths he possessed already" (G. J. Warnock). And see the present writer's article in 77 *Camb.L.J.* 229 and 404 (1952 and 1953), "The Concept of a Lawyer's Jurisprudence."

made quite clear whether these undoubted differences are due to different notions about the same subject-matter, or to different notions (or definitions of law) involving different subject-matter, or to differing approaches to the same or differing aspects or relations of the same or different subject-matters. But different notions of law and jurisprudence may differ in these different ways, and it is confusing to discuss them in language suggesting that they are all different notions of, or approaches to, or viewpoints or aspects of, the same subject-matter, law, and all needing to be taken into account to get a complete picture of that single phenomenon. It is suggested that as an introduction to each writer the student needs to be told, not so much his "notion of law" (which, as we have seen, conceals an ambiguity), as the "basic concept of his jurisprudence"—the content of the basic notion or notions he operates with—and his method of handling it. It should then occasion no surprise if these different basic concepts are found to apply to different subject-matters, *e.g.*, norms addressed to judges rather than to citizens (a notion with which Ross surprises Professor Lloyd on p. 240), and not to be merely differently formulated descriptions of the same phenomenon. Each theory of law could then be subjected to three types of appraisal:—on grounds of the fruitfulness of the subject-matter selected by the basic concept and the method of subsequent operations; the accuracy of the results obtained; and the ideology which may have caused the choice of the basic concept or may be promoted by the use of the term law in the selected way.

A textbook constructed, as suggested, around a basic theory of law would have to include some discussion and analysis of norms—and could not therefore omit a theoretical treatment of sources, sanctions, persons, things, acts, titles, rights, duties, liberties, powers and their correlated notions. In other words the subsidiary concepts which had been made components of, and were therefore logically inherent in, the concept of a legal system. Any theory of sources would find it necessary to distinguish between custom as the historical origin of normally developing legal systems, and custom, within an established system, as a source of valid legal rules. In the present volume the distinction is blurred by the treatment of judicial decisions, legislation and equity, quite appropriately, under the heading of the "Judicial Process"—while custom is relegated, *in toto*, to the previous section on "Custom and the Historical School." It is suggested that this section would be clarified by an extract from Professor Sprott's *Science and Social Action* analysing the process whereby social interaction may be said to generate norms.

Professor Lloyd, though paying full tribute to his importance, has clearly failed to get on terms with Kelsen, or, for that matter, with Ross,—and in particular has failed to understand the function which Kelsen requires of his *grundnorm*. It is childish to say that Kelsen, when asked why the *grundnorm* forms the keystone of the whole legal arch, replies, in part, “don’t ask silly questions” (p. 302). He gives a perfectly clear answer in the extracts printed on pp. 318 and 319, and again on p. 329. If we want to construe law as consisting of valid norms, and valid norms cannot be inferred from facts, then we must assume the validity of an initial norm. That this is clear does not, however, prevent Kelsen’s whole theory of legal norms from being misconceived. Though we may never be able to infer normative statements from facts, we may yet be able to construct a notion of norm which is such that it may be reduced to facts. Then we may be able to discover a *grundnorm* instead of having to postulate one. By substituting a positive notion of norm, as we have suggested, for Kelsen’s rather difficult “epistemological transcendental” notion, we can thus render the terms of his answer fallacious.

Professor Lloyd’s account of reasoning by analogy is as vague as his account of the way to select the facts “suitably” covered by a definition of law. “. . . what is here involved . . . is the rational use of analogy, whereby a case is compared with like and unlike, so as to determine the ‘proper’ scope of a legal rule. No analogy is of course compelling in a purely logical sense as leading to a necessary conclusion” (p. 400). We might expect the remainder of this sentence to tell us what amounts, in the judicial mind, to a compelling analogy—the analogy pointed to by the purpose of the rule, or by the standards of value current in the legal system, in the legal profession, in public opinion. Instead the sentence limps to the lame conclusion “. . . but as a practical matter human beings do reason by analogy, and find this in many instances a useful way of arriving at normative or practical conclusions.”

When Professor Lloyd takes to quoting extracts from his own works we may wonder what sort of conclusion it is which can be “based merely on logical reasoning” (p. 423), and, even allowing for the fact that the context refers to the common law, we may be puzzled by the assertion that it can hardly be contested that “the lawyer is never faced with anything in the nature of logical compulsion . . .” (p. 448). What then is the mechanism by which judges “find themselves reluctantly constrained by an earlier precedent . . .” (p. 450)? Is it not the irresistible logic of an authoritative “ratio”? This is not, of course, to suggest that

the authoritative "ratio" or binding principle of an earlier case can be formulated—if indeed it can ever be given a final authoritative formulation—without taking into account the particular facts which came up for decision and any "compelling" analogies.

The bold attempt to weld original extracts and commentary into a coherent text inevitably presents serious difficulties of selection. What appears at first as omissions in the author's text often, however, turn out to be rectified in subsequent extracts,—as when the early history of natural law is left to Professor Jolowicz to relate. On the whole the problem of avoiding both serious omissions and unnecessary duplication seems to have been admirably solved, but the doctrine of sovereignty is nowhere traced further back than the mediaeval period. The treatment of Austin in this context is confused by the failure, as in Austin himself, to distinguish, in relation to sovereignty, between the concept of law itself and its elements, and concepts of the law, of which legal sovereignty is one. This is a failure of the same type as the likening of the definition of law to a definition *in jure civili*, and the confusion of custom as the origin of legal systems with custom as a recognised source of law. Particular legal conceptions may well be omitted from a textbook of Jurisprudence,—but not an appreciation and theoretical exposition of the nature and function of concepts of the law.

Two final questions remain to be asked. Where can one find, today, a better Introduction to Jurisprudence? Where else can one find, so conveniently collected, such relevant extracts from the semantic and philosophical writings of contemporary writers like Dr. Glanville Williams, Professor Gilbert Ryle, Professor Wisdom, Professor Popper, Kelsen, Olivecrona, Ross? The students' need for a good textbook of Jurisprudence is great. No amount of criticism should be allowed to deter Professor Lloyd from the task of grappling with a second edition.

BOOK REVIEWS

Underhill's Law relating to Trusts and Trustees. Eleventh edition. By C. MONTGOMERY WHITE, a Bencher of Lincoln's Inn, one of Her Majesty's Counsel; and M. M. WELLS, of Gray's Inn, Barrister-at-Law. [London: Butterworth & Co. (Publishers) Ltd. 1959. clvii, 617 and (index) 67 pp. 95s. net.]
First Cumulative Supplement to Underhill's Trusts and Trustees (11th ed.). By M. M. WELLS, M.A., of Gray's Inn, Barrister-at-law. [London: Butterworth & Co. (Publishers) Ltd. 1960. x and 10 pp. 5s. net.]

THE distinguished author of *Underhill on Trusts and Trustees* designed it in the form of a Code in which the principles of the law of Private Trusts are reduced to a number of brief Articles, each of which is expanded and illustrated by some pages of commentary. The learned editors of this (and of the preceding) edition have now revised it very thoroughly, removing passages which have lost their usefulness (such as those relating to antiquities about married women's property), incorporating the new cases and statute law, clarifying the text where necessary, yet retaining the author's authoritative words so far as possible. Happily, moreover, his last preface is again included, with its telling quotation from Jessel M.R. to the effect that rules of equity, unlike the common law, are not "supposed to have been established from time immemorial" and that, if we wish to know what they are, we must therefore look rather to the more modern cases.

The skill with which this major editorial task has been accomplished can be seen very clearly if one tests the book with the aid of its tables of statutes and cases. Of the old statutes tabled in the previous edition some twenty-five are now omitted, as are numerous sections of various nineteenth-century Acts (such as its Trustee Acts) which have been superseded; and some fifty new statutes are added. And, if the first twenty pages of the table of cases are a fair sample, there are now something like three hundred new cases whilst well over a hundred old cases have gone. Even more striking however is the easy way in which new matter in the text is married to old (with a total increase of only twenty-four pages) and the fact that most of Sir Arthur's code of principles and so much of his commentary are still appropriate today. Like its predecessor the book is elegantly bound and is printed in clear type welcome to the eye. But it has a new readability both by reason of some rearrangement of the text and because, much of the past having been reduced or pruned away, one feels more constantly in touch with the living law.

As before, the first five Articles are "preliminary definitions," beginning with Sir Arthur's definition of "Trust" to which a footnote now admits and seeks to repel the long-felt objection that it fails to cover charitable and other "purpose" trusts. Those who by choice or coercion battle with definitions will add this footnote to their armoury, together perhaps with the problem whether Sir Arthur's decision (in which his learned editors have concurred) to exclude charitable trusts from his Code is what caused him to exclude them from this general definition. It is true that the new index lists some seventeen references to charity (e.g., "anti-vivisection society is not"). Indeed, if one is diligent, even purpose trusts of a non-charitable type are discoverable (not indexed as such, but under various heads such as "dogs," "inanimate objects," "tombs," etc.); and it is interesting to observe that the recent iconoclast decisions, of Harman J. in *Re Shaw* [1957] 1 All E.R. 745 and of Roxburgh J. in *Re Astor* [1952] Ch. 534, are mentioned in several footnotes but seemingly without affecting the text. Perhaps the learned editors, Sir Arthur's Preface notwithstanding, were in sympathy with those of us who are not easily driven from the earlier decisions that non-charitable trusts having no human beneficiaries are not for that reason void (see, e.g., pp. 73, 100-104, where lies the original of Roxburgh J.'s now famous phrase about concessions to human weakness or sentiment). Or perhaps it was not thought appropriate, in a book planned to combine principle with brevity and to serve both students and practitioners, to bow too readily before winds of change at first instance.

The book states the law as at the end of August 1959, and its first cumulative supplement has since added later developments up to September 1960. Many of these derive from the new Charities Act; and some substantial developments affecting charities and non-charities are introduced from *Re Harpur* [1960] 3 W.L.R. 607, *Leahy v. Att.-Gen. for N.S.W.* [1959] A.C. 457 and *Re Endacott* [1960] Ch. 232 (C.A.). The supplement gives the last-named case nearly a page, which makes excellent amends for the book's reticence on the non-charity point mentioned above, and which concludes by quoting Harman L.J.'s commendation of *Re Astor*, *supra*: his Lordship's own comparable decision in *Re Shaw*, *supra* (the alphabet case), had presumably lost some of its force by reason of a curious compromise, on appeal, whereby the trusts he had rejected were undertaken by the Public Trustee.

A very notable achievement in this edition is the incorporation of the Variation of Trusts Act, 1958. The fifteen Articles of Chapter XI assert fifteen respects in which trustees have a "duty" (this word seems not to be indexed though presumably it is somewhere explained and contrasted with a power—*cf.* various passages which hint of compulsion, e.g., pp. 23n., 32, 410 and *passim*). The second specified duty, entitled "Duty of trustee to obey the

directions of the settlement unless deviation sanctioned by the court" was formulated in an Article the leading paragraph of which excepted also any part of the settlement which has been modified by consent of all the beneficiaries: and so, by adding to that paragraph a few words about the court consenting on a beneficiary's behalf, the learned editors have found an appropriate home for both *Chapman v. Chapman* [1954] A.C. 429 and the new Act. In this Article's second paragraph moreover, which formerly dealt only with section 57 of the Trustee Act, they have added the comparable sections from the Settled Land Act and the Act of 1943 (hitherto mentioned only in the commentary). Thus we now have, in Article and commentary, a clear dichotomy between (i) modifications made by unanimous beneficiaries, where the court's function is only to supply the consent of any who are disabled (because not presently ascertainable or not *sui juris*) from consenting for themselves, and (ii) the court's powers under those earlier Acts (augmenting *Re New* [1901] 2 Ch. 534) which, though narrower in scope, are effective even if some beneficiary who is *sui juris* objects.

The four pages of commentary devoted to the Act of 1958 describe its background (including *Chapman v. Chapman*) and its provisions and effect in admirable fashion, and cite a few decisions which were available at the time of writing. The supplement adds several more, notably *Re Steed* [1960] Ch. 407 in the Court of Appeal where certain dicta of Harman J. (two of which had been adopted in the book—pp. 263n., 264) had since been doubted or disapproved. Nevertheless, these pages of the book remain a model of clarity and of helpful and economical exposition.

Your reviewer's conclusion is that this edition of *Underhill* is well worthy of its distinguished author. Within its self-imposed limits, it is sufficiently complete for all ordinary purposes, practical and academic. It is a readable and not a difficult book, skilfully arranged and having an aura of authority.

S. J. BAILEY.

Royal Writs in England From the Conquest to Glanvill: Studies in the Early History of the Common Law. By R. C. VAN CAENEGEM, PH.D., LITT.D., LL.D., Assistant-Lecturer in the University of Ghent. [London: Selden Society, Vol. 77. 1959. xlix, 515 and (indices) 40 pp. Price to non-members: £3 13s. 6d.]

DR. VAN CAENEGEM's book covers ground which has never before been at all systematically explored, except by M. M. Bigelow in his *Placita Anglo-Normannica* (1879) and his chapter on writs in *The History of Procedure* (1880). Bigelow wrote before historians became preoccupied with the thirteenth-century plea rolls. They have since been reluctant to forego those mines of information

for the fragmentary evidence of the twelfth-century monastic cartularies and chronicles, which were Bigelow's only sources for his sketch of the origins of the fundamental common-law actions, and they have too often merely glanced over their shoulders to the earlier period. It is Dr. Van Caenegem's contention that the true beginnings of the common law "must remain hidden to those who try to trace the history of the common law system of writs backwards, with Glanvill as the starting place." His sources are necessarily of the same kind as Bigelow's; for instance, the chronicle of the Abbey of Abingdon is used extensively in both studies. But eighty years of scholarship have made far more material available to Van Caenegem. The present work also makes greater use than any predecessor of the record of payments of amercements and for writs in the pipe-rolls.

Bigelow's approach seems to have made little impression—the *History* of Pollock and Maitland, so brilliant in the exposition of principles, makes no great attempt to trace the chronology of the growth of actions in the twelfth century, and Dr. Van Caenegem does not single out Bigelow's work as the forerunner of his own. Yet Bigelow emphasised "the law of gradual growth" in the development of the common-law writ and saw in Henry I's "executive writs," peremptorily ordering *reseisin* without trial, "an approach to the fixed writ of *Novel Disseisin* of Glanvill." On the other hand, he warned that "an antecedent lineage for a particular writ in Glanvill cannot be made out by an arbitrary piecing together of writs, wherever one can be found containing any resemblance to another." This warning receives some justification from the occasional attribution of the same writ by Bigelow and by Van Caenegem to entirely different lines of development: the present writer cites as an example of the "*praeceipe*" a writ (No. 36 in the appendix) which Bigelow indexed as a forerunner of *Novel Disseisin*.

But the work of Dr. Van Caenegem is so much more systematic and detailed than Bigelow's that he is much the less likely to be misled by superficial resemblances. He can admit that "the reign of Henry II was much too ebullient, searching and creative to allow an early fixation of the writs," yet give a confident verdict on detailed changes, by no means all of which led in the direction which we know ultimately prevailed: "writs of *reseisin* . . . were becoming stereotyped in the earlier years of Henry II; then a reversal of policy on *disseisin* undid everything." The present study is not, like Bigelow's, a chronologically arranged miscellany of accounts, some extremely perfunctory, of twelfth-century pleas, but an elaborate discussion of all the elements of the early writ, with a liberal citation of examples in footnotes and an appendix of 198 classified writs.

From his first chapter on "Sources and Literature" Dr. Van Caenegem passes to a sketch of "The Law Courts" during his

period, and here we find the first of a number of remarks which suggest that he gives his chosen subject somewhat too dominant a place in the legal system. The new royal judges, he writes, "had the task to give redress to freemen for every wrong, *i.e.*, to become a judicial organism where for every wrong an appropriate writ to originate pleading would be obtainable." Yet a glance forward to the thirteenth-century plea rolls shows the continued popularity of the plaint before royal justices. In his third chapter, on pleading in the eleventh and twelfth centuries, Dr. Van Caenegem contrasts the plaint absolutely with the writ: plaints are not "formally differentiated according to the nature of the claims," contain no "stereotyped formulas." This is hardly true of the thirteenth-century plaint. Actions by plaint are often indistinguishable from actions by writ except that the enrolments begin with the word "*queritur*." In this light the continuance of the plaint is seen to be even more "remarkable" than Van Caenegem judges (p. 50). No doubt the formality of the enrolment of a plaint is often a reflection of the formality of a corresponding writ: but we cannot be sure that forms of action always developed as the result of royal writs in which formulas were perpetuated by the verbal habit-forming of royal clerks. It is therefore claiming too much to say that "the common law writs and the whole common law process are the outcome of an organic development of the older executive writs," and some comment would have been useful on Bigelow's dictum that the wording of the writ and the plaintiff's formal "count" converge to create a "form of action."

The "recognition of neighbours" (the origin of which is here discussed interestingly and at length) may not, then, have been the only borrowing by Henry II and his judges from the local courts. Van Caenegem's view that business in the local courts was not transacted according to "the theoretical scheme of the law books" but on the principle of "honourable compromise" need not imply that no permanent aspects of common-law procedure developed there. It is well to recognise the limitations as well as the importance of the subject with which the present study deals. The common-law writs existing in Glanvill's day were concerned with matters of seisin and ownership in which royal intervention, at first in an executive rather than judicial guise, could quickly achieve spectacular results. In the next century there appeared many new writs dealing with more heterogeneous and sometimes subtler injuries, and the characteristics of the actions which these new writs inaugurated are unlikely to have grown up in such a straightforward way. In the twelfth century these injuries must have been the subject of some basic procedure without writ such as the "undifferentiated" appeal for "all serious, private, secular wrongs" postulated by Mr. Richardson and Professor Sayles (*Select Cases of Procedure without Writ*, p. cxxxiii). Out of this procedure, rather than as a result of the

diplomatic experiment with the wording of executive writs which Van Caenegem explores so thoroughly, grew some of the important characteristics of later actions begun by writ (*e.g.*, the ideas of breach of the peace and of tort and force). The present author's preoccupation with the phraseology of writs sometimes makes him stop short of the interesting and important question: we are told (p. 212) that "‘*quam N. ei deforciat*,’ another standard phrase of the future, occurred in the writs at the latest in 1170," but not how *vis* or *force* came to be so generally regarded as an aggravating factor in twelfth-century injuries, nor why this phrase became standard, nor what popular concept it surely implies of the reason for the King's concern with "civil" injuries. Bigelow's *Placita Anglo-Normannica* treated, if it hardly covered, a field much wider than writs. The present study may lose a little by not exploring more deeply the relationship of writs to other aspects of twelfth-century pleas, but it is good to see that Dr. Van Caenegem is applying his skill to the preparation, for the Selden Society, of a *New Placita Anglo-Normannica*.

The author has new and interesting light to throw on a number of old problems. He shows, for instance, that the rule *Nemo tenetur respondere de libero tenemento sine precepto regis* was the outcome of a long campaign against "uncontrolled *implacitare*" during which privileged individuals and communities had received royal protections against impleading by (*e.g.*) Englishmen who could not show past seisin of the property in question, and then by anyone without a royal writ; and he argues that since such special grants were still being made in the early years of Henry II's reign, the general rule could not have been established by Henry I, as Lady Stenton thought. He goes on to criticise the view of Mr. Jolliffe that the rule constituted an example of Angevin tyranny, showing that writs of right very quickly became *de cursu*. He seems generally to have little sympathy with the attitude represented by *Angevin Government*, in which Jolliffe drew heavily on Bigelow's demonstration of the importance of the executive writ in the creation of new legal actions in an attempt to prove that Henry II's system of government was arbitrary in the legal as in every other sphere.

Dr. Van Caenegem also has a valuable chapter on the influence of Roman and Canon law on the growth of the common law. He reaches the negative and well-worn conclusion that they affected "the attitude of people" towards the law rather than its substance, but his survey of this topic must be the most serviceable now existing and owes much to his equal familiarity with English and Continental law. He makes another important contribution when he follows up the suggestion of Pollock and Maitland that the origin of the assize of Novel Disseisin lay in orders issued to justices about to tour the country in 1166 and argues that this first royal move against unjust disseisins was a criminal inquest of a

purely temporary kind. The fact that it was temporary is nicely illustrated by a graph of amercements for unjust disseisins in the pipe-rolls. Similar origins might be sought for other actions, particularly trespass, and the idea may serve to focus interest on the neglected mass of inquests, some criminal, some civil, conventionally and so uninformatively lumped together under the description, "commissions of oyer and terminer," of which we find mention in the thirteenth-century patent rolls: these, as much as individual actions in the ordinary courts, are in the direct line of growth of the common law.

Altogether Dr. Van Caenegem's book is a very valuable contribution to the history of a vital but under-explored period of the development of English law. Besides presenting important conclusions of its own, it gives an example of penetrating methods of inquiry in a field where the sources of evidence are not always obvious.

ALAN HARDING.

Judge and Jurist in the Reign of Victoria. Being the eleventh volume in the series of Hamlyn Lectures. By C. H. S. FIFOOT, F.B.A., of the Middle Temple, Barrister-at-Law, Reader in Common Law to the Inns of Court. [London: Stevens and Sons Ltd. 1959. viii, 137 and (index) 2 pp. 15s. net.]

THE nineteenth century has passed into the domain of history, however difficult it may be for those of us who were born in Victoria's reign to realise it. And what a formidable century it is in the history of the law, as in that of so many other fields. The Hamlyn Trustees have rendered a notable service to legal scholarship by giving Mr. Fifoot, who had already proved himself a master of the Year Books, an opportunity to show himself equally at home in Victorian legal literature. No one who has heard him lecture can be in any doubt as to the intellectual thrill which his hearers in the University of Bristol must have experienced. But the lectures are so packed with thought, and the minds of the audience must have been so often distracted by a scintillating phrase, that little more may have been remembered than the wholesome lesson that there were giants in those days. The printed version reveals so much concentrated reasoning and erudition that it is entitled to be warmly commended to all lawyers both as a mine of material and as a stimulus to thought.

One of the most remarkable facts about it is the range of reading extraneous to the law upon which it draws. In the first eight pages alone the author invokes Froude, Bagehot, Conan Doyle, T. H. Green, Herbert Spencer, John Stuart Mill, Robert Chambers, George Eliot, Matthew Arnold, F. H. Bradley and Dean Stanley. The frequency of allusions to lay authors is naturally greater in an introductory chapter than in the subsequent

treatment of specialised topics, but non-legal references abound throughout.

The first chapter, entitled "1837-1901: Judge and Jurist," suggests two thoughts. First, how valuably this chapter might be expanded into a book. Knowledge of the personalities and contributions of particular lawyers is one of the keys to the understanding of English law. The obstacle to the acquisition of such knowledge early in life lies not in the dearth of material but in its abundance. Everyone knows, for instance, that Lord Bowen's contribution in his comparatively short career was of the first order. But who has time to read his life by Cunningham, in which Mr. Fifoot has profitably quarried? The second thought is that any survey of the makers of English law in the Victorian age ought to include an account of some of those who made stupendous efforts for the reform of the mechanics of the law. Some of these became Chancellors—notably Lord Cairns and Lord Selborne—others were laymen like Lord John Russell, whose Home Secretaryship at the beginning of the reign effected sweeping reductions in the incidence of the death penalty. Lord Campbell, whom Mr. Fifoot excludes from the *alpha* class by a narrow margin, might perhaps be lifted into it by including on the merit side of his account his activity as a law reformer, pursued even within the last days of his octogenarian life.

The specific topics which Mr. Fifoot examines in his main chapters are Civil Liability, Corporate Personality, Possession and Criminal Liability.

The core of the problem of civil liability was, he rightly says, the treatment of negligence: "to harvest the rich crop of running-down actions the judges were forced to recognise negligence as a distinct species of Case." Perhaps at this point a tribute might be paid to Sir John Comyns (C.B. 1738-1740), whom contemporary lawyers regarded as one of the ablest of their number. Comyns in his *Digest* includes under his title "Actions on the Case" a sub-title "Actions on the Case for Negligence." But "negligence" in Comyns' day meant primarily "neglect," and most of the examples given by him in that sub-title are in respect of neglects of duties owed by holders of offices or by parties to contracts. As the normal meaning of the word changed to "carelessness" it became necessary to determine in what circumstances a person who had acted without normal care would be liable for consequences disastrous to another. It is remarkable how slowly judges came round to the view that persons who make something in pursuance of a contract may owe a duty of care towards a person, other than a party to the contract, who is damaged by reason of carelessness in the making of the thing. The efforts of many judges and expenditure of much money by litigants were required to free the law from the trammels forged in 1842 by the Court of Exchequer (Lord Abinger C.B., Alderson, Gurney and Rolfe B.B.) in

Winterbottom v. Wright, 10 M. & W. 109. In that case the plaintiff failed in an action on the case in respect of injuries suffered by reason of the defective building of a coach by the defendant under contract with the Postmaster-General. A contrast might usefully be drawn between this case and one not cited by Mr. Fifoot which came before the Court of Exchequer in 1848. Sir Frederick Pollock was then Chief Baron in place of Lord Abinger, but two barons who had sat in the earlier case were still in office. The case in 1848 was *Grote v. The Chester and Holyhead Ry. Co.*, 2 Exch. 251. The facts were that the defendants had constructed a railway line, including a bridge, and had leased it to another railway company. The plaintiff, while a passenger of the latter company, had been injured by the collapse of the bridge. The plaintiffs won at *nisi prius* in an action on the case. When a motion for a new trial on the ground of misdirection came before the Court of Exchequer, it was not suggested either by the Attorney-General, who moved for the defendants, or by the court, that no action would lie on account of the principle laid down in *Winterbottom v. Wright*. Little notice was taken of *Grote's* case until particular attention was called to it by Lord Atkin, when by his strenuous efforts he brought about the majority decision of the House of Lords in *Donoghue v. Stevenson* [1932] A.C. 562 at p. 586.

Negligence naturally leads on to *Rylands v. Fletcher*, best known of all nineteenth-century cases. Though it was a House of Lords case, reported in (1868) L.R. 3 H.L. 330, in which *Rylands*, the defendant at first instance, was the appellant, the most important judgment is that of the Exchequer Chamber (the appellate court of those days) delivered by Blackburn J. in 1866, and reported in L.R. 1 Ex. 265. Mr. Fifoot quotes the well-known words used by the latter, which were subsequently repeated with approval by Lord Cairns in the House of Lords: "The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." Legal historians will regret that he does not mention the fact, of great interest, that Blackburn J. based his judgment to a considerable extent on one of Sir John Holt's cases, an examination of which occupies two and a half pages of the report. The case is *Tenant v. Goldwin*, in 1704, in which the Queen's Bench held that a man who maintained a privy in his house was subject to a duty to prevent the filth from escaping into his neighbour's cellar. We have three reports of the case in 1 Salkeld 360, 2 Lord Raymond 1089 and 6 Modern 311.

The limits of a review exclude the possibility of commenting on Mr. Fifoot's other chapters. I can but express the confidence that any student of the law, from tiro to judge, will read his book

with interest and profit. I hope that there will be future editions of it, and that they will contain a table of cases.

H. A. HOLLOND.

Cases on Private International Law. By J. H. C. MORRIS, D.C.L., of Gray's Inn, Barrister-at-Law, Fellow of Magdalen College, Oxford, University Reader in Conflict of Laws. [Oxford: Clarendon Press: Oxford University Press. 1960. xxxiii and 513 pp. 50s. net.]

THE judicious choice of materials and the high quality of the connecting text, which links the reported cases to the general development and does not shrink from critical and constructive comment, have secured for this casebook a firm place in the literature on English Private International Law. In the third edition, Dr. Morris has excised some older and added rather more new cases. The result is attractive. *Adams v. National Bank of Greece* appears as a new example of characterisation; *Luther v. Sagor* has changed its place and now heads a new section on governmental interference with property, which includes *Re Helbert Wagg and Bank voor Handel v. Slatford*. *Government of India v. Taylor* is accompanied by the significant comment that English courts take notice of foreign penal or revenue laws. However, the reference to *Regazzoni v. Sethia* invites the reflection that foreign public law as a whole is never applicable elsewhere, but that it is a fact to be taken into consideration in a great variety of circumstances, but *Re Emery's Investment Trusts* [1959] Ch. 410 seems to go further. *Re Beaumont and Lord Advocate v. Jaffrey* have been dropped, together with *Simonin v. Mallac*, but the effect of the unavoidable appearance of *Starkowski v. Att.-Gen.* might perhaps have been mitigated by an excursus on problems of conflict of laws in time. All the new favourites have been given a place in the sections on divorce and nullity. *Re Grove* has made its exit and *Re Hurll* has been admitted. Adoption cases figure for the first time. The section on contracts has been little altered, but discharge is now illustrated by three cases. An Australian and an American case amplify the material on tort. One notes the comeback of *Freke v. Lord Carbery* and the elimination of *Re Miller, Lee v. Abdy* and *Alcock v. Smith*. Three decisions and an admirable summary make up a new section on winding up. *Re Egerton* and *Frankel's Estate v. The Master* enliven the otherwise stagnant subject of matrimonial property relations. *Re Maldonado* is a useful case, but a warning of the kind expressed in [1954] C.L.J. 22 might have put the reader on his guard against accepting characterisation by the *lex causae*. Powers of appointment are a notoriously difficult topic in the conflict of laws, and one welcomes the addition of *Re Pryce*. As may be expected, *Harris v. Taylor* has been replaced

by *Re Dulles*, but the sacrifice of *Vadala v. Lawes* in favour of *Syal v. Hayward* leaves a sneaking feeling of regret. Staying actions has been further illustrated by *The Fehmarn*, but perhaps the wish may be expressed for the inclusion, in a future edition, of a case illustrating the concurrence at home and abroad either of proceedings *in rem* and *in personam*: *The Hartlepool* (1950) 84 Ll.L.R. 145; *The Peshawur* (1883) 8 P.D. 32, or of several proceedings *in rem*: *The Christiansborg* (1885) 10 P.D. 141; *The Marinero* [1955] P. 68. *Leroux v. Brown* has vanished into the limbo of legal history while that product of the co-operation between academy and bench, *D'Almeida Araujo Lda. v. Sir Frederick Becker & Co., Ltd.*, fittingly concludes the volume.

As may be expected, the notes are always stimulating, and it is only possible to single out a few points. Dr. Morris feels (p. 92) that, apart from other reasons, *Ogden v. Ogden* must be supported, since it would be dangerous to treat a marriage, celebrated in England and valid by English law, as invalid. He may be right, if limping marriages are desirable. To the reviewer it appears preferable that registrars of marriage should require expert evidence of the capacity of the parties to marry in England. Dr. Morris (pp. 134-135) would extend the operation of *Travers v. Holley* to situations where the parties are domiciled abroad, even if the courts of the foreign domicile will not recognise a decree pronounced elsewhere. The reasons for questioning such a conclusion were given in [1959] C.L.J. 10 at pp. 11, 13. Now that the *Vita Food* case has come of age, one of its illegitimate fathers may confess to the lapse which has been fastened upon Lord Wright: see (1938) 12 *St. John's Law Review* 242 at p. 256. *Re Egerton*, dealing with matrimonial property relations in the absence of a marriage contract or settlement, is accepted without comment. However, in purporting to follow the orthodox line advocated by Dr. Morris himself, to the effect that the law of the domicile of the husband at the time of the marriage applies, the court did in fact let in the subjective test, for it admitted an exception "if it appears from an express contract or from the circumstances that the parties intended some other legal system to apply." This solution is baffling. Since *ex hypothesi* there is no marriage contract or settlement, what kind of an express or tacit contract does the court envisage? It seems to envisage no more than a choice of law clause *in vacuo*, or one which must be deemed to have selected the statutory, as against any optional, régime, at least in so far as civil law systems are concerned, for these require a specific choice out of several available régimes. Moreover, according to *Re Egerton* the choice appears to be limited to the law of the first new matrimonial domicile, which may even apply only after the parties have changed their domicile [1956] Ch. 593 at p. 606. In discussing *Bank of Africa v. Cohen*, the impression is

created (p. 323) that *renvoi* may be relevant in determining capacity to contract.

Finally, it may be observed that Dr. Morris has succeeded in extracting from the sources and in presenting to the reader the greatest possible array of vivid facts and thereby has endowed the cases with a degree of liveliness which is unusual even in books on private international law.

K. LIPSTEIN.

Le droit transitoire (Conflits de lois dans le temps). Second revised edition. By PAUL ROUBIER, Doyen honoraire de la Faculté de Droit et des Sciences Economiques de Lyon. [Paris: Editions Dalloz et Sirey. 1960. xv, 582 and (index) 8 pp. N.F. 45.25.]

It is rare to find legal literature of the kind which deals with practical problems of domestic law, albeit on a highly theoretical level, and which can, nevertheless, be studied with profit by scholars interested in other legal systems, but Roubier's book deserves to be brought to the notice of English lawyers for this very reason. The first edition published in 1929 has been much quoted, but has not been easy to come by in recent times, and the appearance of a second, revised edition is to be welcomed. As the title indicates, the book is concerned with the application of law in time, and since it is written by a Continental lawyer on the basis of Continental, mainly French, practice, it is concerned with the application of previous and subsequent legislation in relation to past, present and future factual situations. Judge-made law, as the author rightly remarks (pp. 23, 248, 267) sees the problem in a different light, and must only grapple with it in comparable circumstances where subsequent legislation attempts to sort out conflicting case law.

While accepting the fact that legislation may expressly attribute to itself a retroactive effect, the author seeks to establish general principles which apply when the legislation is silent about its operation in time, and which should serve as a guide to legislative draftsmen. He recognises that the approach is determined by considerations of policy. Where the trend is conservative and where legislation is principally consolidation, the old law will be allowed to survive as long as possible. But where the aim of the legislation is reform, as it usually is in modern times, the desire to assure unity of law will lead naturally to the immediate application of the new law. The limits of this application are the centre of the author's discussions. It is his merit to have divorced his principal tenet from that which proclaims the protection of acquired rights and to have shown that, instead, the alleged pre-eminence of the protection of acquired rights is the result of a false analysis. In reality different types of legal rules (substantive, procedural,

rules of limitation, of interpretation or of form) and different branches of law (labour law, criminal law) are applied either more or less extensively, according as the factual situation concerns past, present or future, continuous or successive events. Thus individual types of legislation apply to these events only if there is a sufficiently strong link with them, which link may be described, in terms of private international law, as a connecting factor. The variety of these situations is so great, as the French, Italian and German practice examined by the author shows, that it is impossible to set out or to criticise the author's solutions, except to point out that his conservative attempt to preserve the application of the old law which governed a contract, when it was concluded, even after the law has been changed, does not seem entirely convincing, since it is based on the twin ideas that the law in force at the time when the contract was concluded has been incorporated into the contract and that the originally legitimate expectations of the parties are not to be disappointed. Not only students of private, but also of criminal and procedural law will find much to attract their attention, but the student of the conflict of laws will be less satisfied, since the author believes that the problems of inter-temporal law present themselves differently to the conflict lawyer. This, however, is only true in a superficial sense. While inter-temporal law within a given legal system operates, so to say, on a two-dimensional plane, it assumes a three-dimensional character when the application of foreign law is involved. Here, the rules of the conflict of laws must determine not only which legal system applies in space, but whether the efflux of time and of a shifting factual attachment must be taken into account. Thus regarded, the incubus of foreign retroactive legislation loses much of its terror, for if the immediate application of foreign law is excluded either because the event under consideration is past or because the factual attachment has shifted while the situation is still continuing, its retroactive effect is irrelevant together with the legal system which enacted the legislation.

These few remarks should suffice to show how much lawyers everywhere are indebted to Professor Roubier for making available to them, once again, this thought-provoking book.

K. LIPSTEIN.

The Law of Contract. Fifth edition. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Sometime Vinerian Professor of English Law in the University of Oxford, and C. H. S. FIFOOT, M.A., F.B.A., of the Middle Temple, Barrister-at-Law, Reader in Common Law to the Council of Legal Education. [London: Butterworth & Co. (Publishers) Ltd. 1960. xlix, 561 and (index) 41 pp. 50s. net.]

CHESHIRE AND FIFOOT on *The Law of Contract* was a success from

the outset, and it is by now an established and well-proven work. It may be confidently predicted that in its fifth edition—from the hands of the original authors—it will continue to be a first and essential handbook for students and practitioners alike. As one would expect, the present edition contains no great surprises. Those who opened the plum-covered newcomer eagerly looking for a drastic revision of the chapter on mistake, or a sensational *volte-face* in the treatment of frustration, will have been disappointed, and most justly: for if the work were to suffer these changes it would cease to be *Cheshire and Fifoot*. Indeed, not only do the learned authors remain unrepentant adherents of the “just solution” theory of frustration, but the suggestion that a contract may be made by the court and not by the parties is further maintained, first, by the continued appearance of the passage on “Unreasonable Terms” and, secondly, by the introduction of a new section entitled “Constructing a Contract.” (In the latter, *Clarke v. Dunraven* [1897] A.C. 59, half of the collateral contract cases, and *Abbot v. Sullivan* [1952] 1 K.B. 189 make strange bedfellows.) There are few other new departures; and, in the circumstances, it is perhaps natural that many of the comments which follow might equally well have been found in a review of an earlier edition.

But, first, a more general observation. Is the book showing signs of an incipient conservatism? Does it not centre around the contract of the forties, rather than the sixties? True, there is a welcome heading “Excluding and Limiting Terms” in Part II, and there is new material on the “fundamental obligation”; but one wishes that the latter had not been called a “fashionable” doctrine in the preface. The collateral contract is now recognised, but the discussion is unhappily divided between different sections of the book. One feels, too, that some important periodical articles merited more notice than a brief footnote with no substantial alteration of the text: *Atiyah on Infants’ Contracts* (22 M.L.R. 273), for example (noted at p. 347), and the nameless references in the chapter on mistake (pp. 174, 177 and especially 179, where the learned authors for reasons not altogether convincing still decline to accept *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377). Moreover, is there not a need for a change of approach, particularly in the sections on interpretation, in order to give greater emphasis to the present-day economic and social background and current commercial practice? The preliminary discussion on pp. 22–24 headed “Twentieth century conditions” might well also be expanded.

Little need be said concerning the new cases and the only new statute of importance (the Restrictive Trade Practices Act, 1956), for they have fitted readily enough into the existing structure of the book. Rather, it may be more useful to look at one or two earlier cases which are, unfortunately, still left out. Is any treatment of collateral contracts and exemption clauses complete

without *Webster v. Higgin* [1948] 2 All E.R. 127? The section on communication of acceptance might profitably include *Powell v. Lee* (1908) 99 L.T. 284 or some other case illustrating the inadequacy of an informal or unauthorised communication. *De la Bere v. Pearson, Ltd.* [1908] 1 K.B. 280 is probed anew for the elusive consideration and *Ward v. Byham* [1956] 1 W.L.R. 496 is similarly examined, but students still lack the benefit of the learned authors' views on *Rajbenback v. Mamon* [1955] 1 Q.B. 283 and *Gaisberg v. Storr* [1950] 1 K.B. 107. Again, it is felt that orthodoxy is unduly championed by discussing at length *Adler v. Dickson* [1955] 1 Q.B. 158 and *Midland Silicones, Ltd. v. Scruttons, Ltd.* [1959] 2 Q.B. 171 (now affirmed in the Court of Appeal [1961] 1 Q.B. 106) but relegating to footnotes the more interesting cases of *Elder Dempster & Co., Ltd. v. Paterson, Zochonis & Co.* [1924] A.C. 522 and *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402. *Hall v. North Eastern Ry.* (1875) 10 Q.B. 437 is not mentioned at all. Similarly, one could wish that *Baldry v. Marshall* [1925] 1 K.B. 260 were balanced by the inclusion of *Lynch v. Thorne* [1956] 1 W.L.R. 303, and that *Valentini v. Canali* (1889) 24 Q.B.D. 166 might reappear along with *Rowland v. Divall* [1923] 2 Q.B. 500 at pp. 541-542.

It is perhaps too readily assumed that the distinction between *fructus industriales* and *fructus naturales* has ceased to be of importance as a result of section 62 of the Sale of Goods Act, 1893. Nor can it be accepted, with respect, that *Stocks v. Wilson* [1913] 2 K.B. 235 was "virtually overruled" by *Leslie (R.), Ltd. v. Sheill* [1914] 3 K.B. 607. The difficult doctrine of restitution is, indeed, all too briefly discussed: when, alas, will a textbook in current use state the law as happily as did *Salmond and Winfield*? Finally, can the text at pp. 510-511 stand with *Tredegar Iron and Coal Co., Ltd. v. Hawthorn Brothers & Co.* (1902) 18 T.L.R. 716?

One older case now included may prove to be of great importance. At pp. 225 and 238, *Pennsylvania Shipping Co. v. Compagnie Nationale de Navigation* [1936] 2 All E.R. 1167 is cited as authority for the proposition that no equitable remedy for a misrepresentation lies once the representation has been embodied in the contract as a term. Whether this is a desirable rule may be argued, but at least it is straightforward; and one might be permitted the observation that, had it been more widely known in 1950, we might have escaped the tangles of *Leaf v. International Galleries* [1950] 2 K.B. 86 and its successor *Long v. Lloyd* [1958] 1 W.L.R. 753. Perhaps it is not too late to suggest that, even now, the rule in the *Pennsylvania Shipping* case renders it unnecessary ever to apply the reasoning in the two later cases.

But these comments are trivial when set beside the undoubted fact that this book is in every way as excellent as its predecessors. It will continue to be without peer. Indeed, it is proper that the present reviewer should record that these notes have been written

with the deep sense of indebtedness and respect which befits one who has learned, practised and taught virtually the whole of his law of contract from the five successive editions of *Cheshire and Fifoot*.

L. S. SEALY.

The Criminal Prosecution in England. By SIR PATRICK DEVLIN.
[London: Oxford University Press. 1960. viii and 118 pp.
15s. net.]

THIS book consists of the Sherrill Lectures delivered by Lord Justice Devlin at Yale University in September 1957, and subsequently brought up to date to embody the law as it stood in March 1959. The lectures were intended for an American audience, but such is the lucidity of style that many a page brings fresh light to those supposedly familiar with the general background, or describes a well-known situation with a new and graphic turn of phrase.

The book is divided into four sections, the first three of which deal with the control over the police in matters of interrogation, arrest and detention. The final section is concerned with the procedure followed by magistrates' courts in committing for trial. Thus the whole process from the time of the first investigations by the police up to the moment of arraignment comes under scrutiny.

Lord Justice Devlin describes in felicitous and distinctive phrase how control over the police is secured by informal methods. A convention has grown up that the police will act fairly, and this is zealously guarded by the judges, who can make their views felt through the agency of the Bar. The judges find willing helpers in the members of the Bar, who appear as often for the defence as for the prosecution, and thus exhibit no marked bias on either side.

The longest of the four chapters is the one on interrogation, a topic much in the news at the moment. We are treated to an interesting analysis of the Judges' Rules, which are seen to be entirely within the genius of the English common law, not really rules at all, but principles the disregard of which may lead to the exclusion of evidence tendered at the trial. But how effective is this intimation of the standards expected. By and large there is no doubt that the police do their utmost to keep to the spirit of these rules, informal and ambiguous though they may be.

A book of this brevity cannot be expected to lay down with precision the law on every subject touched upon. When the very learned author wrote that the offence of misprision of felony was practically obsolete, he cannot have anticipated that it would be cited to the Court of Criminal Appeal: *R. v. Sykes*, *The Times*, January 24, 25, 1961. In any case, the revival of misprision came, some months after this book had gone to press, in *R. v. Wilde* [1960] Crim.L.R. 116. A short treatment will inevitably be, on

occasion, over simplified. There is no reference to the difference between eavesdropping unknown to either party to the conversation, and eavesdropping with the connivance of one of them, but again it was not until the closing weeks of 1959 that a case arose leading to the drawing of this distinction by the Home Secretary: (1960) 76 L.Q.R. 1. We are told that a police officer is entitled to use his notebook in giving evidence at the trial, but surely only to refresh his memory. We are told that the police never use tape recorders, but see [1956] Crim.L.R. 442. It is said that under the Indian Evidence Act a confession to a police officer cannot be put in evidence, neglecting the important modification of this in section 27. In the treatment of *Wright v. Sharp* (1947) 176 L.T. 308, it could have been made clearer which way the case was decided.

These small criticisms are offered only with an eye to a second edition, which, it is greatly to be hoped, will in course of time appear, for this book is the best short account in our language describing the pre-trial procedure in the case of an indictable offence, to be recommended with pride to people from other lands, and students of our own. Even our own lawyers, well versed in this field, will learn something, will understand the familiar principles better, and love them better: they will often be delighted to meet an old friend in new guise, and from time to time to receive a precious glimpse into the working of the judicial mind itself.

R. N. GOODERSON.

Parliamentary Supervision of Delegated Legislation. By JOHN E. KERSELL, Assistant Professor of Politics, McMaster University, Hamilton, Canada. [London: Stevens & Sons, Ltd. 1960. xvi and 178 pp. 25s. net.]

PROFESSOR KERSELL has written a useful account of the supervision of delegated legislation by a number of legislatures in the Commonwealth, including the Parliament of the United Kingdom. His title has been carefully chosen—parliamentary supervision; he accordingly does not deal with judicial control of statutory instruments, nor does he seek to maintain that legislatures can control, as distinct from supervise, the process of enacting delegated legislation. If lawyers are sometimes still reluctant to accept this form of legislation as a proper function to be exercised by the executive, they may be disposed to criticise the author for the omission of judicial control.

The book examines the prerequisites of supervision, *i.e.*, publication and laying, as well as what the author calls “parliamentary supervision” both in Upper and Lower Chambers. He goes on to devote two chapters, which cover about half of the book, to opportunities for influencing legislation by debates and other methods of ventilating grievances. These two chapters disclose

that in practice no legislature, not even the House of Commons, devotes very much time to the discussion of delegated legislation. The chapters are of great value to the student as explaining, especially with regard to the House of Commons, the exact use to which various procedural devices may be put.

This comparative study discloses that, apart from the Scrutinising Committee of the House of Commons, only the Committee on Regulations and Ordinances of the Australian Senate is really active in the supervision of certain types of delegated legislation. It is noticeable that in the author's own country of Canada it is purely political considerations which have prevented the use of Scrutinising Committees (p. 77). Of the positive suggestions which emerge from reading the book two are particularly worth mentioning. Why should not the House of Lords enlarge the jurisdiction of its Special Orders Committee to bring it into line with the Scrutinising Committee of the other House? If this suggestion were adopted, it would surely come more appropriately at a time when a Conservative Government is in office. The second suggestion is that motions for annulment by prayer should be replaced by motions that a statutory instrument be referred to the Government for consideration. In view of the fact that the process of praying is relatively modern—it has only been done since 1943—and that prayers do not in practice result in annulment of the legislation, this is a proposal which might well be pursued by the House of Commons.

E. C. S. WADE.

State Immunities and Trading Activities. By SOMPONG SUCHARITKUL, M.A., D.PHIL. Foreword by PROFESSOR C. H. M. WALDOCK, C.M.G., O.B.E., Q.C., D.C.L. [London: Stevens & Sons Ltd. 1959. xlv, 359 (bibliography) 20 and (indices) 10 pp. £3 10s. net.]

PROFESSOR WALDOCK observes in his foreword to this study: "Few subjects are attracting more attention from international lawyers today than the legal protection of private interests as against the State in international commerce." Since the nineteenth century state control of public utilities and transport systems has become a feature of many countries. In the present century, most governments, whether they be Socialist or those espousing private enterprise, assume a variety of functions in war-time and other emergencies, including, for example, the importation and distribution of food and fuel. And, of course, a large number of states either have a considerable public sector in their economy or, in the case of Communist states, have their economy and foreign trade completely under state control. However, courts in various jurisdictions determined the rules relating to the immunity of foreign states from the local jurisdiction in the nineteenth century, at a

time of *laissez-faire*, and without reference to the possibility of a great increase in state trading. Extensive doctrines of immunity were established in a number of jurisdictions, including the United States and those of the United Kingdom.

Dr. Sucharitkul sets out to discover how far the doctrine of absolute immunity is established in the law at the present time and demonstrates that to a great extent the rule of absolute immunity has been qualified in some jurisdictions and that in some it was not adopted in the first instance. Having reached this conclusion he then suggests a basis for a new approach to the question of immunity from jurisdiction: he admits that the *jure imperii*, *jure gestionis* distinction presents difficulties and suggests simply that "trading activity" by a state or its agencies should not be the subject of immunity. "Trading activity," he submits, is a concept generally understood and of reasonable clarity.

The problem as to the extent to which immunity should be restricted in the case of state trading activities is not a novel one and has been discussed by jurists for some time. Nonetheless, Dr. Sucharitkul has made a major contribution to the literature by a study which represents a great wealth of material and which will be invaluable to those involved in codifying the law. The selected bibliography of monographs and articles contains over three hundred references and the writer has drawn on the decisions of some thirty jurisdictions.

Of the value of this work there can be little doubt. However, the form of presentation is less than satisfactory. After a brief historical introduction, Part Two on "judicial and governmental practice" follows. This consists of chapters on immunities of sovereigns and ambassadors with respect to trading activities, immunities in respect of public vessels employed in trade, the immunities of state agencies, and ends with a very long chapter on "general tendencies towards restriction of immunities in international practice." This latter chapter involves much repetition of previous material and this part as a whole lacks cohesion. In spite of the reference to governmental practice in the title of the Part, the sources referred to do not include evidence of executive policies apart from treaty provisions, with the sole exception of American policy. Part Three, rather curiously, is titled "Legal Developments," and contains a chapter dealing with the opinions of writers on absolute and restrictive immunity and another on the opinions of writers on immunities of state agencies engaged in trade. Part Four comprises a chapter containing the writer's suggested solution to the problem and arguments in support thereof, a chapter dealing with related topics such as attachment and counterclaims, and a very brief concluding chapter. There would seem to be a general lack of logical sequence and an awkward separation of the sources. More particularly, the constant effort to find support for the restrictive view of immunity, in terms of

particular jurisdictions and particular sources of law, interferes with the, ultimately more important, process of presenting the mass of material analytically. The element of partisanship is too obtrusive.

With the diffidence due to one who has devoted so much industry to the problem, some criticism may be offered in regard to matters of substance. The evidence relied upon by the writer is derived principally from the European and American jurisdictions. After making allowance for language and other difficulties, it is still rather surprising that no attempt is made to present the views of states at present outside the orbit of American and West European influence, since, to be effective, rules should be related to the likelihood of general acceptance. Moreover, there is little reference to state practice apart from treaties, or to the attitude of the International Court of Justice on analogous questions, for example, statements in the *Monetary Gold Case*, *I.C.J. Reports*, 1954, p. 19 at p. 32. It is also possible that some interesting material exists in the form of decisions of administrative and "quasi-judicial" bodies. In presenting his material the writer places more emphasis than is justifiable upon dicta, dissenting judgments and particular decisions supporting the restrictive view of immunity. This incorrect emphasis leads on occasion to somewhat exaggerated statements of which the following is an example (p. 182): "The current trends of opinions of judges in the higher tribunals of the United Kingdom, particularly the House of Lords, strongly support the principle of restrictive immunity" (*cf.* pp. 68-70, 165, 256). What of Lord Denning's splendid isolation in the *Rahimtoola Case* [1958] A.C. 379? More consideration might have been given to the recognition of the immunity of *de facto* governments.

Dr. Sucharitkul very fairly states the arguments relating to the two main bodies of opinion on the choice between absolute and restrictive immunity (pp. 259-284, 325-335). At the same time it would seem to be pertinent to relate the problem to what actually happens if jurisdiction is exercised and the *lex fori* is applied in the form of the conflict of laws rules as qualified by doctrines of public policy (*cf.* pp. 314-316). Foreign states may not relish the application of doctrines of public policy, to which the conflict rules themselves will be related although sailing under a different flag, but may prefer inter-state negotiation, arbitration or judicial settlement. There is, after all, no local remedies rule for states as yet. Further, the writer admits (p. 263) that the exercise of jurisdiction by national courts may not lead to successful execution. The points of principle and policy involved have been considered recently by Zourek and Seidl-Hohenveldern (*J.D.I. (Clunet)*, Vol. 86 (1959), pp. 638, 1051).

IAN BROWNLIE.

Manual of Legal Citations. Part II. The British Commonwealth.

Edited by PROFESSOR G. D. NOKES. [London: University of London, Institute of Advanced Legal Studies. 1960. xiii, 81 and (index) 7 pp. £1 1s. net.]

THE first part of this *Manual* was reviewed in [1960] C.L.J. 250. The second part follows the model of the first very closely, and will be equally useful or even more so because it guides and advises in respect of material that is less easy, in some cases much less easy, of access than that published in the British Isles. For this reason and also because of the large number of territories involved, the second part must have been much the more difficult to produce. Both the design and its execution deserve praise.

Two changes from the arrangement adopted in Part I, already reviewed, may be noted. The general table of abbreviations of reports of cases indicated the courts in which the cases reported in each series had been decided. This information was not intended to be exhaustive, but was misunderstood by some people to be so; for this reason and also because of the excessive space that would have been required for similar information in Part II, it has been omitted. Similarly, no statement of the frequency of publication of periodicals appears in the table of abbreviations of their titles because changes occur too often. It will be interesting to see what modifications will be called for in the parts of the *Manual* covering non-common-law countries. The interval between the publication dates of the first two parts was commendably short, and the reviewer hopes that his curiosity will soon be gratified.

W. A. STEINER.

Books also received include the following:

Asian and African Legal Consultative Committee: Third Session, Colombo, January 20, to February 4, 1960. [New Delhi: The Secretariat of the Committee.]

Charlesworth on Negligence. Fourth Cumulative Supplement to the 3rd edition. [Sweet and Maxwell, Ltd. 1960. 7s. 6d.]

Chitty on Contracts. Sixth Cumulative Supplement to the 21st edition. [Sweet & Maxwell, Ltd. 1960. 7s. 6d.]

CLARKE HALL AND MORRISON. *Law relating to Children and Young Persons.* Sixth edition. [Butterworth & Co., Ltd. 1960. 97s. 6d.]

Clerk and Lindsell on Torts. Sixth Cumulative Supplement to the 11th edition. [Sweet & Maxwell, Ltd. 1960. 7s. 6d.]

CORRY, J. A. *Law and Policy.* The W. M. Martin Lectures, 1957. [Toronto: Clarke, Irwin & Co., Ltd. 1959. \$3.00.]

- Cuadernos de Derecho Angloamericano*. Nos. 10-11. 1958.
[Barcelona: Instituto de Derecho Comparado. 1958.
115 ptas.]
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- ECKHOFF, T. AND JACOBSEN, K. D. *Rationality and Responsibility
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1960. 30s.]
- FORD, H. A. J. *Unincorporated Non-Profit Associations*.
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- FRIEDMANN, W. *Law in a Changing Society*. [Stevens & Sons,
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Ltd. 1960. £2 5s.]
- FURNEAUX, R. *Robert Hoolhouse*. [Stevens & Sons, Ltd. 1960.
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- GELLHORN, W. *American Rights*. [N.Y.: The Macmillan Co.
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- GOITEIN, H. *Company Law*. [English Universities Press, Ltd.
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- GRAVESON, R. H. *The Conflict of Laws*. Fourth edition. [Sweet
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in the Soviet Union and Eastern Europe*. 2 Vols. [London:
Stevens & Sons, Ltd.; The Hague: Mouton & Co. N.V. 1959.
168s.]
- HANBURY, H. G. *Principles of Agency*. Second edition. [Stevens
& Sons, Ltd. 1960. 35s.]
- HASKINS, G. L. *Law and Authority in Early Massachusetts: A
Study in Tradition and Design*. [N.Y.: The Macmillan Co.
1960. 35s.]
- HOSKING, G. A. *Pension Schemes and Retirement Benefits*.
Second edition, and First Supplement. [Sweet & Maxwell,
Ltd. 1960. £2 10s. and 5s. respectively.]
- HOWARD, D. L. *The English Prisons: Their Past and their
Future*. [Methuen & Co., Ltd. 1960. 21s.]

- INTERNATIONAL COMMISSION OF JURISTS. *Tibet and The Chinese People's Republic. A Report.* [Geneva. 1960.]
- INTERNATIONAL COMMISSION OF JURISTS. *The Rule of Law in a Free Society.* A Report on the International Congress of Jurists, New Delhi, India, January 5-10, 1959; prepared by N. S. MARSH. [Geneva. 1960. 15s.]
- Kerly's Law of Trade Marks and Trade Names.* Eighth edition, by R. G. LLOYD. [Sweet & Maxwell, Ltd. 1960. £7 7s.]
- KIMBALL, S. L. *Insurance and Public Policy.* [University of Wisconsin Press. 1960. Regular ed. \$6.00; augmented ed. \$7.50.]
- KIRALFY, A. K. R. *The English Legal System.* Third edition. [Sweet & Maxwell, Ltd. 1960. 42s.]
- Latin for Lawyers.* Third edition. [Sweet & Maxwell, Ltd. 1960. 21s.]
- LEHMANN, W. C. *John Millar of Glasgow, 1735-1801.* [C.U.P. 1960. 60s.]
- MARSHALL, H. H. *Natural Justice.* [Sweet & Maxwell, Ltd. 1960. 35s.]
- Medicine, Science and the Law.* Official Journal of the British Academy of Forensic Sciences. Vol. 1, No. 1. October, 1960. [Sweet & Maxwell, Ltd. Annual subscription, £3 3s.; Quarterly, 17s. 6d.]
- MIYAZAKI, K. (Ed.). *A Comparison of Laws relating to Marriage and Divorce. I. Orient.* [Tokyo: Keiso-Shobo. 1960.]
- MUELLER, G. O. W. (Ed.). *The French Penal Code. The Korean Criminal Code.* (Vols. 1 & 2 of The American Series of Penal Codes.) [South Hackensack, N.J.: Fred B. Rothman & Co.; London: Sweet & Maxwell, Ltd. 1960. 30s. each.]
- Odgers' Principles of Pleading and Practice.* Seventeenth edition, by B. A. and G. F. HARWOOD. [Stevens & Sons, Ltd. 1960. £2 15s.]
- Powers Case, The.* Material of the Court Hearings in the Criminal Case of the American Spy-Pilot Francis Gary Powers; Moscow, 17-19 August, 1960. [Soviet News. 1960.]
- ROUSSEAU, F. P. *Handbook on the Group Areas Act (Act No. 77 of 1959).* [Cape Town: Juta & Co. 1960. 45s.]
- SIMPSON, F. L. and FOX, HAZEL. *International Arbitration, Law and Practice.* [Stevens & Sons, Ltd. 1959. £2 2s.]
- Taswell-Langmead's English Constitutional History.* Eleventh edition, by T. F. T. PLUCKNETT. [Sweet & Maxwell, Ltd. 1960. 47s. 6d.]

TOPE, T. K. (Ed.). *Essays in Law*. [Bombay: Government Law College. 1960. Rs. 5.00.]

Where to Look for Your Law. Thirteenth edition, by C. W. RINGROSE. [Sweet & Maxwell, Ltd. 1960. 10s. 6d.; Interleaved, 21s.]

WOETZEL, R. K. *The Nuremberg Trials in International Law*. [London: Stevens & Sons, Ltd.; N.Y.: Frederick A. Praeger, Inc. 1960. £2 2s.]

Yearbook of the International Law Commission. 1960. Vol. 1. [N.Y.: United Nations. 1960. 28s. 6d.]

Year Book of World Affairs, 1960. [Stevens & Sons, Ltd. 1960. 50s.]

Additional books received include:

BITTKER, BORIS I and EBB, LAWRENCE F. *Taxation of Foreign Income. Cases and Materials*. [Stanford University Law School. 1960. \$5.00.]

BULLARD, SIR READER. *Large and Loving Privileges. The Capitulations in the Middle East and North Africa*. The twenty-fifth David Murray Lecture in the University of Glasgow. [Glasgow. Jackson, Son & Co. 1960. 6s.]

GREEN'S DEATH DUTIES. Third Cumulative Supplement to the 4th edition. [Butterworth & Co. 1960. 10s. 6d.]

SCHWARZENBERGER, GEORG. *A Manual of International Law*. Fourth edition. Two vols. [London: Stevens & Sons, Ltd.; N.Y.: Frederick A. Praeger, Inc. 1960. £4 4s.]

Second United Nations Conference on the Law of the Sea. Official Records. March 17—April 26, 1960. [Geneva: United Nations. 1960. 17s. 6d.]

SHERIDAN, L. A. and DELANY, V. T. H. *The Cy-Près Doctrine*. First Supplement. [Sweet & Maxwell, Ltd. 1961. 8s. 6d.]

Wilshire's Criminal Procedure. Fourth edition, by H. A. PALMER and HENRY PALMER. [Sweet & Maxwell, Ltd. 1961. 30s.]

UNIVERSITY LAW SOCIETY

1960-1961

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During the Michaelmas Term there were four meetings of the Society. The first was a thought-provoking address by Mr. Michael Zander entitled "A Critique of Cambridge Legal Education." An extract of this was later published in *The Cambridge Review* of January 1961. The Society also had much pleasure in welcoming Mr. F. H. Lawton Q.C., as he then was, who spoke to a crowded room on the case of *R. v. Podola* (1959). Cambridge lawyers were most pleased by Mr. Justice Lawton's recent appointment to the Bench; his help to prospective barristers, when Recorder of Cambridge, is remembered with gratitude. Sir Jocelyn Simon Q.C., M.P., Solicitor-General, provided great insight on the problems facing the Royal Commission in his talk on "the Police and the Public." There was one Moot, on a problem in Contract and Tort set by Dr. Glanville Williams, and presided over by Mr. Justice Russell, which provided considerable amusement and instruction. L. Brittan and N. A. Phillips appeared for the appellants and A. J. Arlidge and J. G. Phillips for the respondents.

The programme for the Lent Term consisted of five meetings. Mr. Helenus Milmo, who spoke on "Hatred, Ridicule and Contempt," showed up the difficulties of the practical applications of the Law of Defamation. Other speakers this term have been Sir Reginald Manningham-Buller, Q.C., M.P., Attorney-General and Sir Lionel Fox, C.B., ex-Chairman of the Prison Commissioners, who spoke on "Politics and the Law" and "Penal Practice in a Changing Society" respectively. The annual Moot with Oxford took place this year in Oxford. Mr. Justice Edmund Davies presided and also set the problem, which was on the Formation of Contract. J. McNaught and B. Coles of Oxford appeared for the appellants and I. A. Macdonald and R. A. Morritt for the respondents, who received the normal hospitality from their hosts. There remains only the eagerly awaited visit of Lord Denning.

The following officers were elected for the year 1961-1962: President, D. Thomson (Christ's); Vice-President, A. G. Barker (Trinity); Secretary, A. G. Branch (Emmanuel); Junior Treasurer, A. D. Colman (Trinity Hall).

Communications concerning articles and notes should be addressed to the Editor, Professor C. J. Hamson, Trinity College, Cambridge.

Books for review should be sent to the Cambridge Law Journal, Squire Law Library, The Old Schools, Cambridge.

Subscriptions for the journal and orders for back numbers are accepted by the Treasurer whose address is care of the Journal, as above.